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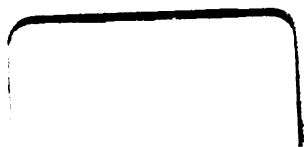
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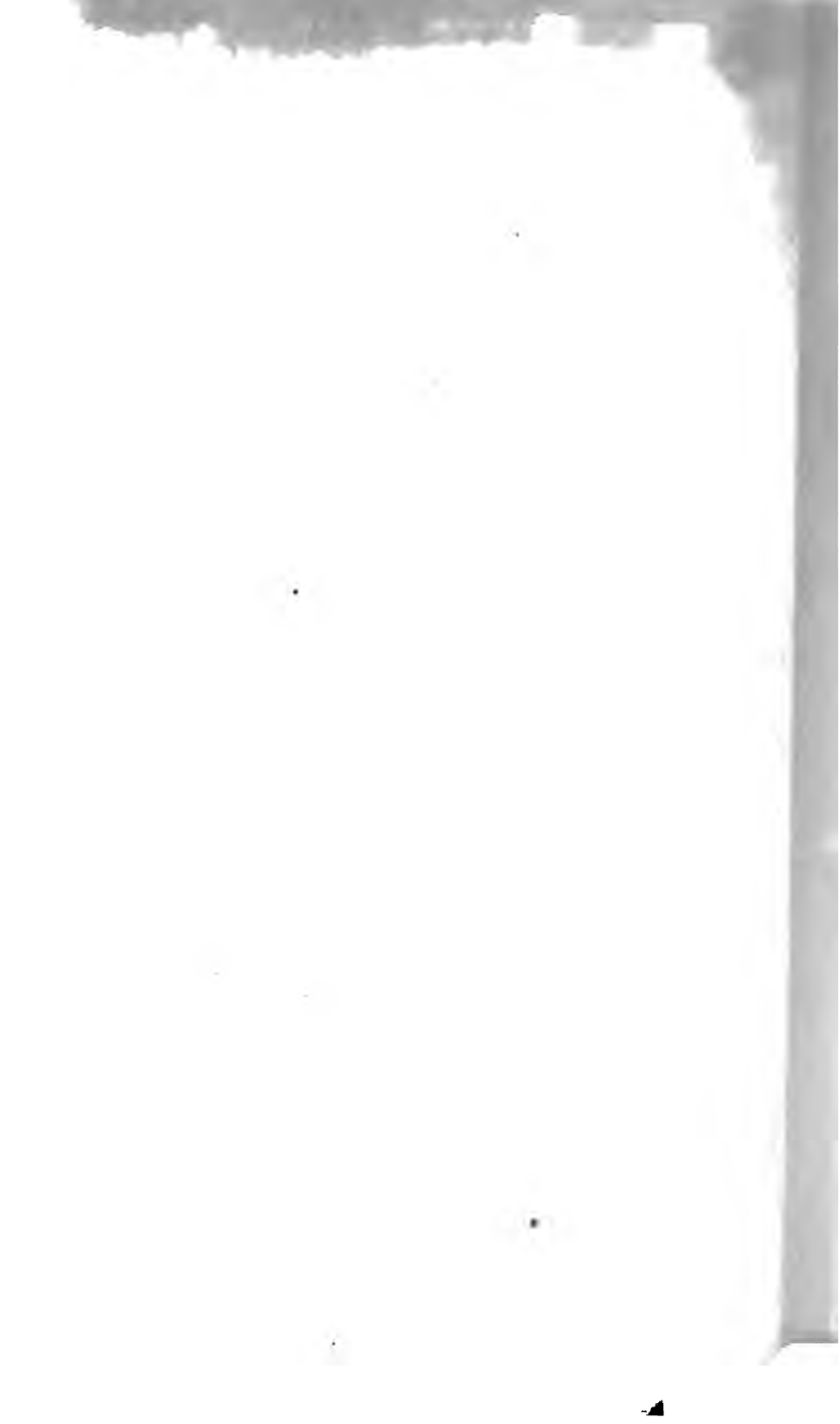
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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN
THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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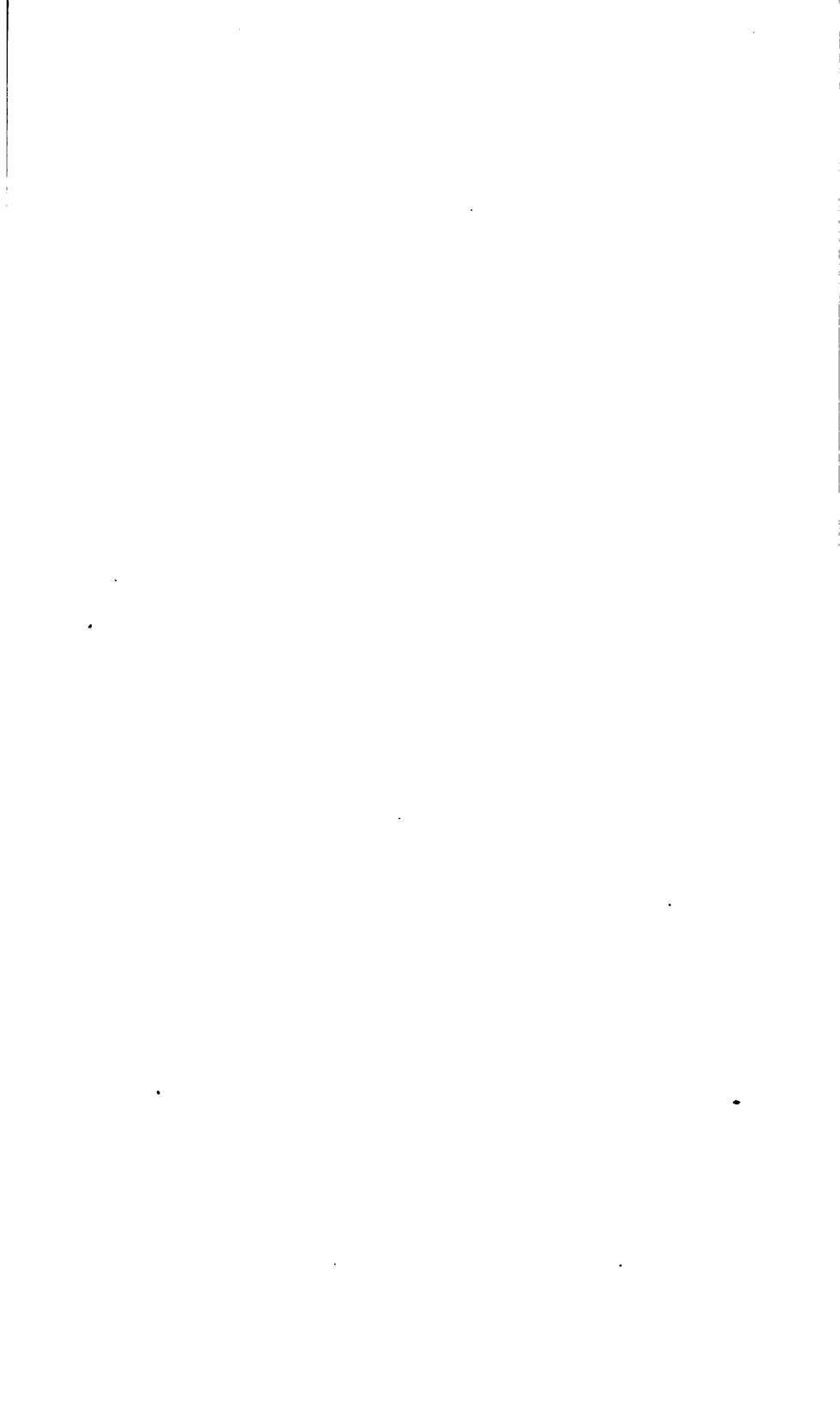
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AMERICAN DECISIONS.
VOL. XXX



CASES
IN THE
SUPREME COURT
OF
NEW YORK.

THE PEOPLE *v.* RENSSELAER AND SARATOGA R. R. Co.

[15 WENDELL, 113.]

INFORMATION IN THE NATURE OF QUO WARRANTO to oust the defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against the individuals; but if the object is to effect a dissolution of a corporation, or to oust such corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation.

JUDGMENT OF OUSTER is rendered against individuals for unlawfully assuming to be a corporation, or against a corporation usurping a franchise. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges.

AN INFORMATION FILED AGAINST A CORPORATION in its corporate name, admits the existence of the corporation.

THE ERECTION OF A BRIDGE ACROSS A NAVIGABLE RIVER, at a point below where licensed vessels carry on a coasting trade, may be allowed, provided the bridge be built with a draw so as not to impair the usefulness of the river.

THE CONSTITUTIONALITY OF A LEGISLATIVE ACT can not be called in question by the people; individuals alleging themselves to be injured thereby, alone can raise the question.

QUO WARRANTO. The attorney-general filed an information in the nature of a *quo warranto* against the defendants, to contest their right to build a bridge across the Hudson at Troy, alleged to be navigable there. The defendant pleaded that by a certain act they were incorporated for the purpose of constructing a railroad from Troy, in the county of Rensselaer, to the village of Ballston Spa, in Saratoga county; that they were a body politic in fact and in name; and, as a necessary part of

such railroad, have constructed a bridge across the river, "leaving over the main or principal part of the channel an opening for a convenient and suitable draw, to enable vessels navigating the river to pass and repass," and so as to restore the river to its former state, and not impair its usefulness. Demurrer and joinder.

S. Stevens, for the people.

D. Buel, jun., and B. F. Buller, United States attorney-general, contra.

By Court, SAVAGE, C. J. In support of the first objection taken on behalf of the people, it is argued that it is not enough for the defendants to aver in their plea that by virtue of the act of 1832, they are created and constituted a body corporate and politic in fact and in name; but that they should aver a compliance with the requirements of that act, and also with the general act relating to corporations, and show a performance affirmatively of those acts which were necessary to authorize them to organize and act as a corporation. The case of *The King v. Amery*, 2 T. R. 515, is cited as an authority on this point, but I am not able to perceive that the decision in that case turned upon that question. The information was filed against the defendant as an individual for exercising the office of alderman of the city of Chester. He pleaded a charter granted by Charles II., and that he was regularly elected an alderman under that charter. The prosecutor took issue upon these facts; and also put in two special replications: 1. That the mayor, etc., were removed by the king by virtue of a power for that purpose reserved in the charter; and, 2. That the attorney-general filed an information against the corporation charging them with usurpation, and that such proceedings were had that judgment *quosque* was entered by default; and that a subsequent charter was granted by James II. in October, 1688, restoring the city of Chester to its ancient privileges, which was accepted by the mayor and citizens, whereby the charter of Charles II. became void. To the second replication the defendant rejoined, that judgment of seizure was rendered against the old corporation in the reign of Charles II., whereby the corporation was dissolved long before the charter by James II. Issue was joined, and on trial the jury found, among other things, the charter of Charles II. as in the defendant's plea, and that the defendant was duly elected by that charter; that the order of removal of James II. was duly signified to the citizens and inhabitants, and that there

was no final judgment upon the *quo warranto*. A motion was made to deliver the *postea* to the defendant, that he might enter judgment thereon. The argument in that case contains much learning on the subject of proceedings against corporations; but it is not necessary to go at large into it.

It was urged on the part of the prosecution, that there are but two sorts of proceedings against a corporation: 1. When a corporation legally created abuses any of its franchises, or usurps others which do not belong to it, then the information should be against the corporation as such, and in such cases the judgment against it is a judgment of seizure; but when a body of men assume to be a corporation, and the information is brought for usurpation, it can not be brought against them by their corporate name, but as individuals; and in such case there must be a judgment of ouster. On the other hand, the opposite doctrine was maintained, and Ashurst, J., in giving the opinion of the court, says that the information called upon the mayor and citizens to show by what authority they claimed to be a corporation; *non constat* by that information that there was any corporation in Chester. The information imports the contrary, for it charges them with having usurped the name, privileges, and authority of a corporation, without any legal right. He says if any charter or prescription existed, it was incumbent on the defendants to have appeared and shown it; and by not doing so, they admitted that there was neither charter nor prescription to warrant such usurpation. This is the whole point of the decision in so far as it is applicable here; and all it proves is, that the information is regular in proceeding against the defendants by their corporate name; but it does not prove that the defendants should do more in their plea than to claim title under their charter. It is not adjudged that the defendants should aver any acts of theirs under the charter to effect their incorporation.

The question as to the form of the plea in a *quo warranto* does not appear to have been much discussed in the cases in this court. In *The People v. Niagara Bank*, 6 Cow. 196, and the two following cases, informations were filed against corporations; and the allegation was made, that without any warrant, grant, or charter, they used certain privileges and franchises, to wit, that of being a body politic and corporate in law, fact, and name, etc. To this charge the defendants answer, that by a certain act of the legislature (setting out the title of their act of incorporation), they were ordained, constituted, and declared

to be a body corporate and politic, in fact and in name; but they do not state the acts which were necessary to be done; such as the opening of books of subscription by commissioners; the subscription by the stockholders; the apportionment of the stock, and the election of directors.

No exception was taken to the plea on this ground, and therefore the approbation by the court of this general mode of pleading ought not, perhaps, to be considered a positive authority in favor of it. Neither do the cases brought by corporations upon contracts prove much on this point. In the case of *The Bank of Auburn v. Aikin*, 18 Johns. 137, the defendants had pleaded *null tiel corporation*, to which the plaintiffs replied that they were a corporation. The court said the replication was bad; the plaintiffs should have shown specially how they were a corporation. Of this case it may be said, that the decision founded on the authority of 1 Kidd, 284, does not give any precise rule, farther than an intimation that there should have been an averment of the performance of those acts which were to be done before they could be a corporation. In *Wood v. Jefferson Co. Bank*, 9 Cow. 194, such a replication was put in to a plea of no corporation, and more was averred than was necessary. It was held that the corporation were not bound to prove the unnecessary averments. It was there intimated that upon the plea of the general issue it was necessary to prove that everything had been done which was necessary to be done before the incorporation became complete; but subsequently, in *The Utica Ins. Co. v. Tillman*, 1 Wend. 555, it was held that a corporation plaintiffs need only prove their charter and acts of user under it; and such is the rule now in this court. If a corporation, when proceeded against, is not bound to prove more than when they sue as plaintiffs, it would not now be necessary to prove more than is averred in the plea pleaded in this case; and from the course of pleading adopted and approved of by the court, in the case of *The People v. Niagara Bank*, and the other cases in 6 Cowen, it would seem that the plea is sufficient, and that it is competent for the attorney-general to reply any matter which would show a failure on the part of the corporation to comply with the requirements of the act creating them. On this point, however, it does not seem necessary to give any definite opinion, because the revised statutes seem to have regulated the proceedings in such cases, and to have adopted the suggestions of the counsel for the

crown, in the case of *The King v. Amery*, as the correct mode of proceeding.

Those statutes provide that an information in the nature of a *quo warranto* may be filed against individuals in several cases; one of which is, "when any association or number of persons shall act within this state as a corporation, without being legally incorporated:" 2 R. S. 581, sec. 28, sub. 3. And a similar information may be filed against any corporate body in several cases, when such corporation shall offend against their charter, or any act of the legislature affecting it; or shall have done or omitted any act which shall operate as a forfeiture by misuser, or non-user, or a surrender; or when it shall exercise any franchise not conferred by law: 2 Id. 583, sec. 39. By secs. 48 and 49, p. 585, the nature of the judgment to be rendered is different in the two different modes of proceeding. Whenever individuals or a corporation shall be found guilty, either of usurping or intruding into any office or franchise, or of unlawfully holding, judgment of ouster shall be rendered, and a fine may be imposed; but when the proceeding is against a corporation, and a conviction ensues for misuser, non-user, or surrender, judgment of ouster and of dissolution shall be rendered: which is equivalent to judgment of seizure at common law. If, therefore, the information in this case had for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should have been filed against individuals; if the object was to effect the dissolution of a corporation which had had an actual existence, or to oust such corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation. The distinction is well exemplified by Sir Robert Sawyer, in *The King v. The City of London*, cited in 2 T. R. 522. He says the rule is this: when it clearly appears to the court that a liberty is usurped by wrong, and upon no title, judgment only of ouster shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the king's hands shall be given. The reason is given: that which came from the king is returned there by seizure; but that which never came from him, but was usurped, shall be declared null and void. Judgment of ouster is rendered against individuals, for unlawfully assuming to be a corporation. It is rendered against corporations for exercising a franchise not authorized by their charter. In such case the corporation is ousted of such franchise, but not of being a

corporation. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges. The information in this case is therefore not the proper proceeding to call in question the corporate existence of the defendants; but in so far as it seeks to oust the defendants from the exercise of any franchise not granted to them, it is appropriate. When, therefore, an information is filed under the revised statutes against a corporation by its corporate name, the existence of the corporation is admitted; or rather, that it once had a legal existence. This brings me to inquire whether the defendants have the right to build a bridge across the Hudson river at Troy, as a part of their railroad.

The first section of the act incorporates Stephen Warren and such other persons as should thereafter become stockholders, and creates them a body corporate and politic, by the name of "The Rensselaer and Saratoga Railroad Company," for the purpose of constructing a single or double railroad or way from some proper point in the city of Troy, in the county of Rensselaer, passing through the village of Waterford, in the county of Saratoga, to the village of Ballston Spa, in said county of Saratoga. The thirteenth section declares that it shall not be lawful for the said railroad company to erect any bridge across the Hudson river within two miles of the place where the bridge belonging to the president and directors of the Union bridge company is erected, between Lansingburgh and Waterford. From these two sections it is clear that the railroad to be constructed from Troy to Ballston Spa, passing through the village of Waterford, must cross the Hudson river; and the clause prohibiting the company from erecting a bridge within two miles of the Union bridge implies an authority to erect one anywhere in the most direct route from Troy to Waterford more than two miles from the Union bridge. If the court can be supposed to have any knowledge of these localities, either personally or from public statutes, it must be very clear that a bridge crossing the Hudson, in the route from Troy to Waterford, must be located south of the Union bridge; and there is nothing in the charter to prevent the company from erecting such bridge directly from a point in the city of Troy to Green island, as a part of the railroad; and we are, on this occasion, at liberty to infer that the location is not objectionable; otherwise that fact would have been shown by replication. Had the company built a bridge below the city of Troy, in the direction of the city of Albany, it would, *prima facie*, not be such a

bridge as is contemplated by the charter. In this case it is averred to be in the direct route of such railroad. If there is in the charter no limitation of the authority thus given, the right of the defendants is indisputable.

The thirteenth section already referred to does contain a limitation or qualification as to the manner in which streams are to be crossed. Whenever it shall be necessary, for the construction of their railroad, to cross any stream or water-course, it is declared to be lawful for the company to cross the same; "but the corporation shall restore the stream or water-course, or road, street, or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness." The defendants, in their plea, claim the right of building a bridge as part of their railroad, and for that purpose of laying abutments and piers in the river, and of placing timbers thereon; but leaving, over the channel, an opening for a draw, to enable vessels to pass and repass the same, "so as to restore the said river to its former state, or in a sufficient manner not to have impaired its usefulness as a public navigable river." This allegation in the plea is in the words of the statute, and is a strict and literal compliance with it. It is also sufficiently explicit to have enabled the plaintiffs to have taken issue upon it, if they had chosen to do so. The plea, therefore, contains a full answer to the information, and is good, in form and substance.

The people of the state of New York are the plaintiffs in this case, and by this proceeding have called upon the defendants to show by what authority they assume to do certain acts. It would, in ordinary cases, be sufficient for the defendants to show that their acts are authorized by the authority of law and of the plaintiffs. Such an answer, I think, is sufficient in this case; and the defendants can only be properly called upon to answer to some person or persons entitled by a license to navigate the river, to compensate in damages for obstructing the navigation, or by some other proceeding on the part of such persons to abate the nuisance, if the bridge is such. As, however, the opinion of the court seemed to be desired by both parties upon the constitutionality of the law, if it authorized the erection of the bridge, and as that question was ably and elaborately argued by counsel on both sides, it can not be improper briefly to express an opinion on the constitutional question.

By the constitution of the United States, art. I., sec. 8, sub.

B, "the congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" and by subdivision seventeen, "to make all laws which shall be necessary for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." In February, 1793, congress passed "an act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." It has been decided, in the case of *Gibbons v. Ogden*, 9 Wheat. 1, that congress has the exclusive power of regulating commerce among the several states; that congress has power also to regulate navigation in the waters of the United States, which are also the waters of individual states; and that the statute of 1793 authorizes vessels licensed under it to carry on the coasting trade. In the case of *The Steamboat Company v. Livingston*, 3 Cow. 713, it was decided that the coasting trade means commercial intercourse carried on between different districts in different states; between different districts in the same state, and between different places in the same district, on the sea coast or on a navigable river. There can be no doubt, therefore, that the coasting trade may be carried on beyond the bridge in question. The information charges that the Hudson river, from the ocean to the city of Troy, and above it to the villages of Lansingburgh and Waterford, is an arm of the sea, in which the tide ebbs and flows, and for forty years has been used in carrying on commerce, in pursuance of the laws of the United States. The place, therefore, where the bridge is built, is one which coasting vessels have a right to pass, and where any obstruction entirely preventing or essentially impeding the navigation would be unlawful.

It is, however, a proposition not disputed, that but for the power granted by the constitution to congress, the state legislatures would have as full and entire control over the waters of their several states, as they have over the land. It follows, therefore, without the declaratory amendment to that effect, that the states reserve all power not granted to congress. The entire sovereignty over the waters of the states, then, vests in congress and the several state legislatures. If this entire sovereignty rested in one government, it could not be doubted that such government might authorize the erection of a bridge across navigable waters, if the business and intercourse of society required such an accommodation. The only objection to

the exercise of such a power might be, that the injury to navigation might exceed the benefits to be derived to society otherwise than from such an accommodation; and on that point the sovereign power must be the judge. It is for the legislature, and the legislature alone, to judge of the expediency of exercising any of its acknowledged powers in any given case. I think I may safely say, that a power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters which they cross. Such power certainly did exist in the state legislatures, before the delegation of power to the federal government by the federal constitution. It is not pretended that such a power has been delegated to the general government, or is conveyed under the power to regulate commerce and navigation; it remains, then, in the state legislatures, or it exists nowhere. It does exist, because it has not been surrendered any farther than such surrender may be qualifiedly implied—that is, the power to erect bridges over navigable streams, must be considered so far surrendered as may be necessary for a free navigation upon those streams.

By a free navigation must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary. For example—a vessel arrives at the port of New York from a foreign port; congress has the exclusive power to regulate commerce and navigation with foreign nations; the vessel arrived has sailed under the authority of the laws of congress, but she is met at the quarantine ground—not by a bridge with a draw which she may pass in half an hour, but by a mandate from the state authorities, stating in substance that the conveniences or necessities of the people of the port which the ship is approaching, require that she shall remain at quarantine one, ten, or twenty days, according to circumstances—is such a detention unconstitutional? It has never been pretended. The contrary has been expressly adjudged, as far as that point could be adjudicated, in the case of *Gibbons v. Ogden*. Chief Justice Marshall says, 9 Wheat. 203: “Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.” He had just spoken of “that immense mass of legislation which embraces everything within the territory of a state not surren-

dered to the general government; all which can be most advantageously exercised by the states themselves." It is here conceded that inspection laws, quarantine laws, health laws, laws regulating internal commerce, laws which respect turn-pike roads and ferries, are constitutional, and are of course no infringement of the powers granted to the general government. The chief justice adds an "etc." after the word ferries, implying that there were other subjects of a similar nature in his mind, which it was unnecessary to specify—and what is more analogous to a ferry than a bridge, for which a ferry is but a substitute? I have already stated that the general government and the state government, between them, possess the sovereign power; and the sovereign power may doubtless build bridges where necessary. It has been correctly said that the federal constitution is a grant of power, while the state constitutions are limitations of power. There is in our state constitution no limitation of the power to build bridges, and there is in the federal constitution no grant of such a power.

There can be no question, therefore, that the state legislature has the power to build bridges where they shall be necessary for the convenience of its citizens. The right must be so exercised, however, as not to interfere with the right to regulate and control the navigation of navigable streams. Both governments have rights which they may exercise over and upon navigable waters; and it is the duty of both so to exercise their several portions of the sovereign power, that the greatest good may result to the citizens at large. It is the right and the duty of the general government to adopt such measures that the commerce and navigation of the country shall not be improperly obstructed; and it is the duty of the state governments to afford their citizens all the facilities of intercourse which are consistent with the interests of the community, and which shall not obstruct the powers granted to the general government. It fortunately happens, that in the particular case now under consideration there is no necessity for collision. The maxim "*sic utere tuo ut alienum non lædas*" is the rule for both governments. A bridge with a draw, which shall be opened free of expense for every vessel sailing under a license as a coasting vessel, affords all the accommodations necessary for citizens in the vicinity or for travelers, and does not impede the navigation in any essential degree. The case of *Wilson v. The Black Bird Creek Marsh Company*, 2 Pet. 245, has been cited and relied on by the counsel on both sides as an authority having a bearing

upon this case. The company sued Wilson and others in the supreme court of the state of Delaware, in an action of trespass, for breaking a dam erected by them, by the authority of the legislature of that state, across the Black Bird creek—a navigable stream which flowed through a marsh on the banks of the Delaware river. The defendants pleaded that the place where the trespass was committed was part of Black Bird creek—a public and common navigable creek in the nature of a highway, in which the tide flowed and reflowed; that they, with their sloop, which was regularly licensed and enrolled according to the laws of the United States, sailed in and upon the creek; and because the dam had been unlawfully erected, and obstructed the navigation of the navigable creek, therefore they tore it up, doing no unnecessary damage.

The plaintiffs demurred, and the supreme court sustained the demurrer and gave judgment for the plaintiffs. The court of appeals affirmed the judgment. The defendants brought a writ of error to the supreme court of the United States. Mr. Wirt, who argued for the Black Bird Creek Marsh company, admitted that the creek was navigable and a public highway, but insisted that the legislature of a state may stop a highway. He contended that the stream in question remained under state control, and was not subject to the laws of congress regulating commerce; that there had been no legislation by congress, with which the company had interfered. Chief Justice Marshall says: "The measure authorized by the act stops a navigable creek, and must be supposed to abridge the rights of those accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or laws of the United States, is an affair between the government of Delaware and its citizens, of which the supreme court can take no cognizance; that if congress had passed any act regulating commerce in those creeks, the court would feel no difficulty in saying that a state law, conflicting with the law of congress, would be void." He says expressly that the power of congress had not been so exercised as to affect the question, and on that ground affirmed the judgment of the state courts. I confess I do not see why the law of congress did not have an operation, if the vessel was navigating under a coasting license, and was making a voyage for commercial purposes from one place to another in different districts, or in the same district. But we have no concern with the propriety of the decision, so long as the principle is clearly avowed upon which it was decided. According to that principle,

the defendants in this case would have no right to build an impassable dam where they have erected a draw-bridge. The Hudson river is admitted by the pleadings to be a public navigable river; it is of course subject to the navigation laws of congress, and the bridge can only be justified upon the principles which I have previously endeavored to maintain. There is a material distinction between a draw-bridge, which detains a vessel for only a short time, and a dam which stops the navigation entirely. The bridge in question with a draw is no greater obstruction than the dam erected by the state a short distance north of the bridge, but still south of the villages of Lansingburgh and Waterford. That dam would be an illegal obstruction but for the lock by which vessels pass it. So would the bridge without a draw; but having a draw, it is no greater obstruction than the dam with a lock. The dam was built by state authority, to facilitate the internal commerce of the state. So is the bridge to facilitate internal communications and intercourse—both peculiar objects of state legislation.

Instances of bridges over navigable waters are very numerous. There are such bridges in the vicinity of Boston, and there is one in the district of Columbia, between Alexandria and Georgetown. Neither the federal government nor the federal judiciary have shown any disposition to act otherwise than with all proper liberality, in the exercise of the powers granted; nor can they be justly charged with an inclination to encroach upon the reserved powers of the states. It is not, I apprehend, for the state authorities to go in advance of the federal government, in making a surrender of powers not claimed by the federal government, and which, if surrendered, can not be exercised at all. In the present case it must be remembered that neither the general government, nor those claiming rights under them, have contested the right to build a draw-bridge at Troy. Those who represent the people of the state of New York raise this objection to a law passed by their own representatives.

I hope I have said enough to vindicate the legislature from any attempt to exercise powers which do not belong to them, and to show that the act to incorporate the Rensselaer and Saratoga railroad company is far from any constitutional objection.

Judgment for defendants on demurrer.

PLEADINGS AND PROCEEDINGS IN QUO WARRANTO.—The writ of *quo warranto*, having its origin at some unascertained period, early in the history of

the common law, was a high prerogative writ in the nature of a writ of right for the king against one who usurped or claimed any office, franchise, or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right. It also issued in cases of the misuser or non-user of a franchise, commanding the respondent to show by what right, "*quo warranto*," he exercised the franchise, having never had any grant of it, or having forfeited it by neglect or abuse: 3 Bl. Com. 262-264; High on Extra. Rem., sec. 592. If the respondent could not establish his right, the franchise or office, as it might be, was forfeited to the crown. As many of the charters under which the franchises were claimed had been destroyed in the numerous insurrections under which the country suffered, or had been otherwise lost, sufficient authority for the exercise of the royal grants could not in very many instances be shown, and the crown became enriched at the expense of its subjects. The writ was especially calculated to subserve the purposes of a grasping monarch, as the right of the respondent to his office, liberty, or franchise was heard before commissioners of the king's own appointing. To correct the abuse of the royal prerogative, and to afford some opportunity for a fair and convenient hearing, the statutes of Gloucester, 6 Edw. I., 1278, and *de quo warranto novum*, 18 Id. 1290, were passed. These statutes secured the right of a trial before the justices on their circuits, and confirmed those franchises resting in prescription, or claimed under charter granted within the time of Richard I., or granted prior thereto but since allowed.

This writ was of a civil nature, forfeiting or annulling some franchise, or ousting the respondent from its exercise; and being a writ of right, it was conclusive upon the crown. These features of the proceeding, together with the reason that with the discontinuance of justices in eyre, 2 Coke Inst. 498, the statute 18 Edw. I. lost its efficacy, led to the introduction of the speedier remedy, and one not so binding on the crown, of informations in the nature of *quo warranto*. This remedy was criminal in its nature, and not only forfeited the usurped or misused franchise to the crown, but also punished the usurper. Like the original writ of *quo warranto*, the precise date of the appearance of this information is unknown. It grew up side by side with the older writ and gradually supplanted it. It was a criminal proceeding, and warranted the imposition of a fine for the usurping of the king's liberties; but the fine fell to a nominal amount, and the information existed merely as a substitution for the original *quo warranto*. Thus far the contest in respect to a given franchise was carried on under the writ of *quo warranto*, or information in the nature thereof, between the crown and its subjects only. The province of the information was, however, greatly enlarged by the statute of 9 Anne, c. 20, 1711, which gave to private individuals the power of proceeding thereunder against any one who had unlawfully usurped or intruded into any office or franchise. This act, one of vast importance, is preserved in substance in the majority of the states of the union.

The procedure therein mapped out is still preserved, and is expressed in the following language: "Sec. 4. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or

persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto*; and if it shall appear to the said respective courts that the several rights of diverse persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises, and such person or persons against whom such information or informations in the nature of a *quo warranto* shall be sued or prosecuted shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed shall give further time to such person or persons against whom such information shall be exhibited to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of a *quo warranto* shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in any wise notwithstanding."

Prior to this act the information was exclusively a prerogative remedy, employed to punish a usurpation of the privileges of the crown, and in this respect resembled the writ of *quo warranto*. It was filed on the attorney-general's own motion, and did not depend upon the permission of the court. So far as it may still be employed for this purpose, it no doubt may still be resorted to without leave asked: *Darley v. Queen*, 12 Cl. & Fin. 520. But where it is used to determine rights of private individuals other reasons come in. Here the machinery of the government is set in motion on the relation, as it is called, of a private person. The crown officer's name is used because the proceeding is supposed to interest the public as well as the individual relator; and to guard against imposition upon the government, and to prevent the interference of persons actuated by improper motives, the permission of the court was first to be obtained before the information could be filed. This distinction is still preserved, where statutory modifications have not established another rule. It can be very easily understood, however, that in this country, where the people have so prominent a part in the filling of offices, a relator would not be wanting in case of a usurpation, so that the proceeding by the attorney-general on his own motion has been rendered rare.

Such being the nature and origin of the writ of *quo warranto* and the information in the nature thereof, it is proper to consider in what cases the proceeding may be now resorted to, before passing to an examination of the pleading and practice therein. Some confusion may arise in reading the cases by meeting with the use of the expression "writ of *quo warranto*" where the information is plainly meant. But the older process has so long been discontinued, and the phrase by which the substituted proceeding is known is so cumbersome, that courts often make no discrimination, and use the term "*quo warranto*" where "information in the nature of a *quo warranto*" is meant. In fact it has been decided by some of our courts that these terms are synonymous: *State v. West Wisconsin R. Co.*, 34 Wis. 197; *State v. Gleason*, 12 Fla. 190. Although in others the distinction is still preserved: *State v. St. Louis Ins. Co.*, 8 Mo. 330; *State v. Stone*, 25 Id. 555; *State v. Ashley*, 1 Ark. 279, 513; *State v. Johnson*, 26 Id. 281.

As was before observed, the *quo warranto* at common law was used to redress an intrusion into or usurpation of the offices or franchises of the king. The statute of 9 Anne is said by Lord Mansfield, in *Ree v. Corporation of*

Carmarthen, 2 Burr. 869, to have been "calculated only against individuals usurping offices or franchises in corporations, and not against any corporation itself as a body;" and that an information in the nature of a *quo warranto* could not be brought against a corporation as such, except in the name of the attorney-general on behalf of the crown. Under the writ, and the information which supplanted it, these three classes of usurpations or intrusions might be redressed; those of public offices, by private corporations and by municipal corporations.

WITH RESPECT TO WHAT OFFICES WERE PUBLIC in the sense that would warrant the issuance of an information for usurping or intruding into them, it was contended, in the leading case of *Darley v. Queen*, 12 Cl. & Fin. 520, that those only were intended which could lawfully be enjoyed by grant from the crown. But it was there decided that the information would lie "for usurping any office, whether created by charter alone or by the crown, with the consent of parliament, provided the office be of a public nature, and a substantive office, and not merely the function or employment of a deputy or servant, held at the will and pleasure of others." Illustration was found in decisions concerning the following subordinate offices: Bailiff of a court leet: *The King v. Bingham*, 2 East, 308; or of a borough: *The King v. Highmore*, 1 Dow. & Ry. 438; a constable: *The King v. Goudge*, 2 Str. 1213; *The King v. Franchard*, Id. 1149; the steward of a court leet: *The King v. Hulton*, 1 Id. 621; and registrar and clerk of a court of requests: *The King v. Hall*, 1 Barn. & Cress. 123. And as against a usurpation of the following officers the information has lain in this country: County clerk: *People v. Miles*, 2 Mich. 348; county treasurer: *Clark v. People*, 15 Ill. 217; sheriff: *People v. Mayworm*, 5 Mich. 146; *Commonwealth v. Waller*, 83 Pa. St. 105; S. C., 24 Am. Rep. 154; lieutenant-governor: *State v. Gleason*, 12 Fla. 265; governor: *Attorney-general v. Barstow*, 4 Wis. 567; city marshal: *State v. Lupton*, 64 Mo. 415; judge of probate court and his clerk: *People v. Heaton*, 77 N. C. 18; *United States v. Lockwood*, 1 Pinn. 359; pilot: *Palmer v. Woodbury*, 14 Cal. 43; *State v. Jones*, 16 Fla. 306; members of board of assessment and revision of taxes: *State v. Hammer*, 42 N. J. L. (13 Vr.) 435; tax collector: *Hyde v. State*, 52 Miss. 665; *People v. Callaghan*, 83 Ill. 128; school district clerk: *State v. Jenkins*, 46 Wis. 616; mayor: *People v. Thacher*, 55 N. Y. 525; S. C., 14 Am. Rep. 312; *Commonwealth v. Jones*, 12 Pa. St. 365; school director: *State v. Boak*, 46 Mo. 528; elector of president and vice-president, proceeding being had in the name of the United States: *State v. Bowen*, 8 S. C. 400; associate judge of territorial supreme court, in which case the name of the United States must be used also: *Territory v. Lockwood*, 3 Wall. 236.

Against officers holding military offices, the information has been sustained; as the major-general of the militia of Rhode Island: *State v. Brown*, 5 R. I. 1; deputy adjutant-general in the state militia: *State v. Utter*, 2 Green Law, 84; brigadier-general in Pennsylvania volunteers: *Commonwealth v. Small*, 26 Pa. St. 31; captain: *State v. Wadkins*, 1 Rich. 42, *per* Richardson, J., in his dissenting opinion. The majority of the court in this last case were of opinion that the law having created a court of inquiry for the settlement of disputed questions in regard to the election of military officers, the information in the nature of a *quo warranto* would not lie. Preserving the distinction already noticed, as to what is a public office, the information has been denied when asked to remove officers of a corporation, who hold their positions at the will of the directors: *People v. Hills*, 1 Lans. 202; or under appointment by a governor for an uncertain time: *State v. Champlin*, 2 Bail. 220. An interesting question arose in *State v. Paul*, 4 Stew. & P. 40. Under

the constitution of Alabama, the general assembly was empowered to appoint circuit judges. At one of its sessions the assembly created a new circuit, and appointed the respondent, one of its own members, the judge. The court refused to entertain jurisdiction of the information, on the broad ground that such an act would be an improper interference with the legislative department of the government, Judge Saffold saying: "A judicial decision vacating the present appointment would constitute a virtual requisition on a different department to proceed to a reappointment; this might be refused; a collision between the departments be created, a consequence of which would be to obstruct or deny the administration of common justice." In this country the information will not be granted after the expiration of the term of office: High Ex. Rem., sec. 633. It is moreover a fundamental principle that there must be a user of the office before the respondent can be proceeded against by an information: *People v. Callaghan*, 83 Ill. 128. But taking the oath of office is a sufficient user: *Id.* Or exercising the functions of the office without having qualified: *Hyde v. State*, 52 Miss. 665.

THE MISUSE OR USURPATION BY A PRIVATE CORPORATION of any franchises has from the earliest times been corrected by the writ of *quo warranto* or by the information. A franchise being a portion of the royal prerogative existing in the hands of a subject, to misuse or usurp this delegated right is a clear infringement in which the sovereign is directly interested. On this ground the remedy under consideration was and still is resorted to: *People v. Utica Ins. Co.*, 8 Am. Dec. 243 and note; S. C., 15 Johns. 353; *State v. Milwaukee L. S. & W. Ry. Co.*, 45 Wis. 579; *State v. Barron*, 57 N. H. 498; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383, where it is said, p. 389, to be well settled "that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated, and hence through neglect or abuse of its franchises a corporation may forfeit its charter as for condition broken." And further on it is stated that "it may be affirmed as a general principle, that where there has been a misuser or a non-user in regard to matters which are of the essence of the contract between the corporation and the state, and the acts or omissions complained of have been repeated and willful, they constitute a just ground of forfeiture." This is the accepted law: High Ex. Rem., sec. 648. But courts do not favor this means of redressing the abuse of corporate powers, and will refuse to countenance it where there is other ample remedy: *State v. Commercial Bank*, 10 Ohio, 535; *People v. Hillsdale & Chatham T. Co.*, 2 Johns. 190, or where the abuse is doubtful. In respect to the application of the information to the case of a usurpation of an office in a private corporation, Chief Justice Tilghman expresses an opinion in *Commonwealth v. Arrison*, 15 Serg. & R. 127, which represents the prevailing rule in this country (High on Ex. Rem., sec. 653): "I strongly incline to the opinion that in all cases where a charter exists, and a question arises concerning the exercise of an office claimed under that charter, the court may in its discretion grant leave to file an information. Because in all such cases, although it can not be strictly said that any prerogative or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed has no claim but from the grant of the commonwealth, and an unfounded claim is a usurpation under pretense of a charter of a right never granted." So also *State v. Hunton*, 28 Vt. 594.

ALTHOUGH AS AGAINST MUNICIPAL CORPORATIONS, an information in the nature of a *quo warranto* will lie, yet in this country it is very little employed

for that purpose. With us municipalities exist for the benefit of the people, and courts are not inclined to take away the charters because of the misconduct of officers thereunder. But where the municipal corporation never had any legal existence, but usurped the prerogatives and franchises of one, the information is needed, and has been allowed. In *State v. Bradford*, 32 Vt. 50, there was a usurpation of this character, the village of Bradford not having been created as provided by law. Says Chief Justice Redfield: "When the corporation is of a public character, like a town or village, which constitute integral portions of the sovereignty itself, there is more propriety in visiting the usurpation of these important functions of sovereignty with this formal denial of their right to exercise such usurpation, than in the case of a mere private corporation; but the law seems to be the same in either case." And see *Dill. Mun. Corp.*, c. 21; *State v. Miller*, 66 Mo. 323. A question upon which there is a diversity of opinion is in regard to the power of the courts, through the medium of an information, to contest the legality of a member's place in a city council board. Many of the city charters make the supervisors or councilmen judges of the qualifications of its own members. In some states, *People v. Metzker*, 47 Cal. 524; *State v. Tomlinson*, 20 Kans. 692, informations to question the title of members of such bodies have been decided not to lie; whereas in other states, *Commonwealth v. Allen*, 70 Pa. St. 465; *People v. Hall*, 80 N. Y. 117, the opposite view is entertained.

PARTIES TO THE PROCEEDING.—Having seen in what instances the information and the writ of *quo warranto* may lie, the procedure thereunder next commands attention. The law officer of the sovereign must be a party plaintiff to represent the rights of the public. Where the proceedings were set in motion by some private individual, he also must be named as the one on whose relation the information is filed. Prior to 9 Anne, the title to public offices was contestable only by the king, and by his attorney-general the proceedings therefor were taken. This act gave private relators the power to raise the question of an incumbent's title, and the relator was required to be named in the information, although brought in the name of the crown officer. As to franchises, where the proceedings are against the existence of the corporation, the public officer alone is entitled to file the information; it can not lie at the relation of an individual. But to contest an office in a corporation, an information at the relation of some private person may be granted. These positions are settled where not altered by statutory modification. To entitle one to act as relator, he must have some interest in the office or franchise: *State v. Vail*, 53 Mo. 97, 109. The mere interest of a private citizen is not enough to put a private corporation on its defense to the remedy in question: *State v. Paterson and H. T. Co.*, 1 Zab. 9. And, though for private and peculiar injury within its scope, it might lie at the relation of an individual, it would not be granted to dissolve a corporation: *Murphy v. Farmer's Bank*, 20 Pa. St. 415. To contest the title of a committee on the revision of taxes, a citizen has standing as a relator, and generally where the office is a public one: *State v. Hammer* (13 Vr.), 42 N. J. L. 435. Two or more persons claiming different offices can not unite in the same proceeding: *People v. De Mill*, 15 Mich. 164. On the principle that the *quo warranto* is for usurping a royal prerogative, the proceeding must be in the name of the power from which the franchise comes. Therefore, the United States is the proper plaintiff where the contest is concerning the office of associate judge of a territory: *Territory v. Lockwood*, 3 Wall. 236; or of presidential elector: *State v. Bowen*, 8 S. C. 400.

As parties defendant there may be joined all the contestants to an office.

This is permitted by the statute 9 Anne, and is recognized as preventing litigation in most of the state enactments on the subject. With respect to parties defendant in cases of corporations, the principal case lays down a rule regarded as correct by subsequent decisions: If the object of the information is to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should be filed against the individuals; if the object is to effect the dissolution of a corporation which has had an actual existence, or to oust such corporation of some franchise which it has unlawfully exercised, then the information is correctly filed against the corporation. And so *State v. Barron*, 57 N. H. 498; *Scrafford v. Gladwin County Supervisors*, 41 Mich. 647; *People v. Clark*, 70 N. Y. 518.

WHERE THE INFORMATION IS TO BE FILED ON THE RELATION of some one, leave of the court must first be had. This is expressly required by 9 Anne, which first recognized the right of individuals to act as the moving party in the information. But where the proceedings are instituted by the attorney-general, *ex officio* and without any relator, the information is filed as of course, without leave of the court: *Commonwealth v. Walter*, 83 Pa. St. 105; *State v. Vail*, 53 Mo. 97; High Ex. Rem., sec. 707. It was the early practice of the courts to grant the application for leave to bring the information almost as a matter of course, but the growing frequency of the proceeding induced an examination into the merits of the applications, and led to the exercise of a discretion in the premises which gave rise to the now well-settled rule, that the granting of these applications rests in the sound discretion of the court: *People v. Waite*, 70 Ill. 25; *Commonwealth v. Arrison*, 15 Serg. & R. 133; *People v. Sweeting*, 2 Johns. 183; *State v. Tehoe*, 7 Rich. 246; *State v. Tolan* (4 Vr.), 33 N. J. L. 195; *State v. Centerville Bridge Co.*, 18 Ala. 678; *State v. Fisher*, 28 Vt. 714; and this although there may be defect in the respondent's title: *State v. Tolan*, 33 N. J. L. (4 Vr.) 195.

THE METHOD PURSUED, IN OBTAINING LEAVE TO FILE THE INFORMATION, is to present to the court a petition or motion based on affidavits; whereupon an order is directed to the defendant to show cause why the information should not be filed: *People v. Waite*, 70 Ill. 25; *People v. Richardson*, 4 Cow. 103 and note; *People v. Tibbitts*, Id. 383; *People v. Shaw*, 14 Ill. 476; *The King v. Symons*, 4 T. R. 221; *United States v. Lockwood*, 1 Pinn. 365. This is the better practice, and that which is generally adopted where statutes do not otherwise direct. But leave to file the information may be asked in the first instance without a rule to show cause, where notice of the motion is given, and sufficient time allowed to the defendant to prepare affidavits in opposition to the information: *State v. Burnett*, 2 Ala. (N. S.) 140. And a similar practice was adopted in *State v. Gummersall*, 24 N. J. L. (4 Zab.) 529, where leave to file the information was granted in the first instance, and a rule on the defendant to plead was entered at the same time. This course is perhaps preferable where the case is urgent and delay is sought to be avoided. The court would have power to extend the time to prepare affidavits if the notice of motion was not seasonably given. The affidavits of the prosecutor should be positive, and not on information and belief: *The King v. Newling*, 3 T. R. 316; and should a material fact omitted therein appear from the respondent's affidavit, the prosecutor may avail himself thereof: *Rez v. Mein*, Id. 596. But affidavits on information and belief will be sufficient where the matter of hearsay and belief goes not to the validity of the title, but merely to the fact of the party having exercised the office: *The King v. Slythe*, 6 Barn. & Cress. 240. Upon the hearing of the rule to show cause, the defendant may give counter affidavits: *People v. Waite*, 70 Ill. 25. Unless the defendant's

affidavits be such as to put the matter beyond dispute, the court will make the rule absolute for the information, in order that the question concerning the right may be properly determined: Bull. N. P. 210 a; *United States v. Lockwood*, 1 Pinn. 359; *State v. Burnett*, 2 Ala. 140.

THE INFORMATION.—The peculiarity of the proceeding has led to some diversity in regard to the manner of pleading which ought to be adopted. The information, criminal in form, is now almost wholly confined to the settlement of controversies of a civil nature. Some of the courts insist upon observing the forms of criminal law in the pleadings, according to the local forms of indictment, and pronounce a departure therefrom fatally defective: *United States v. Lockwood*, 3 Wall. 236; *Donnelly v. People*, 11 Ill. 552; *Wight v. People*, 15 Id. 417; *Lavalle v. People*, 68 Id. 252; whereas others prefer that the pleadings should conform to the principles and rules applicable to civil actions, as far as is possible. This view is favored by High Ex. Leg. Rem., sec. 710, and is adopted in *State v. Kupferle*, 44 Mo. 154, saying that the "information, answer, and reply are subject to the rules governing corresponding pleadings in strictly civil cases—the information in this regard answering to the petition in civil suits." So also *State v. Commercial Bank*, 10 Ohio, 535; *People v. Richardson*, 4 Cow. 97, in note; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383.

The attorney-general may disclose in his information the specific ground of forfeiture, and in some states they are required to be set out in a direct and traversable form: *Attorney-general v. Petersburg R. R. Co.*, 6 Ired. 456; *People v. Manhattan Co.*, 9 Wend. 351; *People v. Kingston Co.*, 23 Id. 193; *Van Riper v. Parsons*, 40 N. J. L. (11 Vr.) 1; or the charge may be general. The plea then disclaims or justifies, and the replication sets out the specific acts or omissions upon which it is supposed the forfeiture has occurred: *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *State v. Commercial Bank*, 10 Ohio, 535. This latter course is conceded even in 6 Iredell's Law, *supra*, to be the correct proceeding in the absence of statutory alterations. The information need not set out the title of the government or of the relator, for the source of the franchise being in the sovereign, the respondent must at all times be prepared to show how he became entitled thereto: *People v. Ridgeby*, 21 Ill. 66; *State v. Gleason*, 12 Fla. 265; *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312. But in *State v. Boal*, 46 Mo. 528, it is explained that where the relator himself seeks the possession of the office, allegations of his eligibility and title are necessary. It is also stated in *People v. Thacher*, *supra*, that judgment against the defendant, without proof of title by the relator, will not entitle him to the office. For insufficiency of the allegations, the defendant ought to demur: *State v. Boal*, 46 Mo. 528; *People v. Palmer*, 14 Cal. 43; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *Territory v. Lockwood*, 3 Wall. 236. The commonwealth is entitled to amend the information either on or before the trial: *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; and a motion to quash for mere formal defects will not be entertained: *Id.*; *People v. Richardson*, 4 Cow. 109, in note.

AT THE ANCIENT COMMON LAW THE PROCESS ISSUING upon the writ of *quo warranto* to bring the defendant into court was a summons, and upon default, the liberties and franchises in question were seized; but on the information the attorney-general proceeded either by *venire facias* and *distringas* or by *subpoena* and attachment: *State v. Hunton*, 28 Vt. 594; *People v. Richardson*, 4 Cow. 100. Unless the court acquire jurisdiction of the defendant, his privileges can not be taken from him. The appearance pursuant to the order to show cause is not an appearance upon the information: *Commonwealth v.*

Sprenger, 5 Binn. 353. Jurisdiction, says the court, in *Hambleton v. People*, 44 Ill. 458, 459, can be acquired "only by service of a writ under the seal of the court, and running in the name of the people."

THE DEFENDANT MUST EITHER JUSTIFY OR DISCLAIM; not guilty and *non usurpavit* are not good pleas, they being no answer to the charge to show by what warrant or authority: Bull. N. P. 211, a; *State v. Utter*, 14 N. J. L. (2 Green) 84; *State v. Barron*, 57 N. H. 498; *Ill. & Ry. Co. v. People*, 84 Ill. 426. And if he seeks to justify, he must set forth facts which, if true, would vest the legal title in him: *State v. Harris*, 3 Ark. 570; *Clark v. People*, 15 Ill. 217; *State v. Jones*, 16 Fla. 306; *People v. Richardson*, 4 Cow. 113, in note, where forms are collected, showing that the defendant may plead as to part, and disclaim as to part. And under the 32 Geo. III., c. 58, sec. 2, and the statutes in some of the states, he may set forth as many defenses as he has: *People v. Stratton*, 28 Cal. 382. After plea, the attorney-general demurs or replies, and the subsequent proceedings are in the same manner as in civil actions: *People v. Richardson*, 4 Cow. 118. The issues of fact raised upon the information may be tried by a jury: *Commonwealth v. Waller*, 83 Pa. St. 105; *People v. Albany & Susquehanna R. R. Co.*, 57 N. Y. 161; *State v. Allen*, 5 Kans. 213. But in *State v. Johnson*, 26 Ark. 281, 291, the court argues from the fact that an act, 3 Geo. II., c. 25, was specially passed, giving the king or respondent the right to demand a jury, that, prior to that time, the right did not exist, and consequently decided that respondent could not ask a jury trial in the case then before the court. A similar view is held by the Missouri supreme court: *State v. Lupton*, 64 Mo. 415; S. C., 27 Am. Rep. 253. A new trial may be granted on trials of *quo warranto* informations: *Commonwealth v. Woelper*, 8 Am. Dec. 628; 3 Serg. & R. 52.

If judgment be given for the defendant, it should simply state that he is entitled to the office or franchise. Upon a recovery by the king on a disclaimer, the franchises were immediately forfeited to the crown. As against a corporation the judgment under the *quo warranto* was that the franchise be seized into the king's hands, but under the information a fine was simply imposed, and ouster decreed, without forfeiture of the franchise: *King v. City of London*, 3 Harg. St. Tr. 545. A further distinction is made in the principal case in respect to an information involving a corporate franchise. "Whenever individuals or a corporation shall be found guilty either of usurping or intruding into any office or franchise, or of unlawfully holding, judgment of ouster shall be rendered, and a fine may be imposed; but when the proceeding is against a corporation, and a conviction ensues for misusing, non-user, or surrender, judgment of ouster and of dissolution shall be rendered, which is equivalent to judgment of seizure at common law." These various forms are alluded to in *State v. Bradford*, 32 Vt. 50, and *People v. Richardson*, 4 Cow. 120, in note. On forfeiting a corporate franchise, the corporation goods do not vest in the people: *State Bank v. State*, 1 Blackf. 267. And, as in the principal case, judgment of ouster of a particular franchise only may be rendered, without seizing the entire corporate charter. The judgment of ouster against the incumbent of an office does not of itself entitle the relator claiming it to be admitted; he must prove his title thereto: *People v. Thacher*, 55 N. Y. 525; *State v. Boal*, 46 Mo. 528. And where another proceeding is pending regarding the right to hold the office, the court will not interfere therewith under the *quo warranto* information: *State v. Taylor*, 15 Ohio St. 137. The imposition of a fine is within the discretion of the court; but in most cases it is merely nominal. Costs follow the event of the suit, and their awarding depends upon the local statutes: *Rez v. Wallis*, 5 T. R. 375; *State v. Jenkins*, 46 Wis. 616.

CLARK v. VORCE.

[15 WENDELL. 193.]

MINUTES OF TESTIMONY OF DECEASED WITNESS taken at a former trial by one who states that he tried to take down all the witness said, not the substance, but the precise words, is admissible although the party will not swear that he had taken down every word.

ON RE-EXAMINATION OF A WITNESS after cross-examination, he may be examined, in the discretion of the judge, upon new matters.

EJECTMENT, the plaintiffs claiming under a certain will. Questions were raised in regard to the admission of evidence, which appear from the opinion. Verdict for the plaintiffs.

H. A. Wisner, for the defendants.

H. Welles, *contra*.

By Court, SAVAGE, C. J. With respect to the testimony of a deceased witness, the rule is laid down with much strictness; but if nothing will answer, but an exact transcript of the testimony of the witness in his very words, and all his words, it will exclude all such testimony. There are few or no cases where a cautious and prudent man will swear that his notes of testimony of a witness, taken down at the time, contain his very words, and all his words. It seems to me that Mr. Whiting's notes should have been received, connected with his oath, as to their accuracy. It was his intention at the time to take down the words of the witness—not the substance or legal effect of his testimony. The reason assigned in 4 Serg. & R. 203,¹ against receiving the notes of counsel is not applicable to this case. Here it was the intention of the witness to take down, not the substance, but the words of the witness. The offer in this case comes within the rule as stated in *Wilbur v. Selden*, 6 Cow. 164. The witness was ready to swear to his belief of the accuracy of his minutes, and it was his intention to take down the words of the deceased witness.

As to the re-examination of Gilbert Drew: there must necessarily be a large discretion in the judge as to the examination of witnesses. The object of a trial is to ascertain all the facts relating to the issues joined. It is the duty of counsel to examine a witness to his whole case when he calls him; but if counsel calls a witness who knows facts to sustain several points in his client's case, [and] inadvertently omits to examine the witness to one point, until after he has been cross-examined, there is surely no

¹ *Lightner v. Wils.*

reason in the policy of the law against a further examination. It may, perhaps, be inconvenient to the judge and opposing counsel, to enter into the further examination, but that is not a sufficient reason why the party calling the witness should be deprived of material testimony. It is not consistent with justice that a party should lose his cause, because the testimony is not introduced with strict technical precision, or that it may possibly give additional trouble in taking notes of the testimony. It seems to me that too much pertinacity in a strict adherence to arbitrary rules is sometimes grasping the shadow, and letting go the substance. Justice is always best administered by a liberal indulgence to parties in the production and examination of their witnesses. But the actual existence of the rule itself is perhaps questionable. Mr. Starkie says that, after a witness has been cross-examined, the party calling him has a right to re-examine him to explain the cross-examination, and the witness' expressions, and his motives for using them; "but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness:" 3 Stark. Ev. 1751. For this rule he refers to the *Queen's case*, 2 Brod. & B. 297. The rule itself is of very recent date, and I am not aware that it has ever received the sanction of this court. I do not believe that such extreme strictness is best calculated to elicit truth, or to promote the ends of justice. It can not be right that a party should be deprived of material testimony because his counsel inadvertently omitted to examine a witness to all the facts within his knowledge, during his direct examination, and previous to a cross-examination. It is no answer to a party who is ruined by an erroneous verdict of a jury, that his counsel did not put the questions to his witnesses, precisely as he ought, in order of time. In this case, the examination of witnesses was not closed, and there is no good reason appearing upon the case why the testimony should not have been received.

If such a rule should be strictly adhered to, a witness may not have given half his testimony before his mouth is sealed. In my opinion, the testimony should have been received. I am aware that, sometimes, testimony may be intentionally withheld by the counsel calling a witness, until the witness has been cross-examined. My remarks do not apply to such a case, but to the case of inadvertence, or perhaps ignorance of the facts, within the knowledge of the witness. Having arrived at the conclusion that a new trial should be granted, it is unnecessary

to go into a particular examination of the testimony, to ascertain whether the verdict is supported by it. I will, however, remark that if a testator is to be proved insane by circumstances such as are relied on here, few wills would stand the test; and that, had the testator made an equal distribution of his property, he would probably not have been suspected of insanity. His disposition of his property is certainly very strange; but, generally speaking, a man may dispose of his property as he pleases. The verdict, I think, is against the weight of evidence.

New trial granted.

FOLLOWED IN REGARD TO MINUTES OF TESTIMONY OF WITNESS at former trial being admitted, in *Craigford v. Loper*, 25 Barb. 454; *Hoff v. Bennett*, 6 N. Y. 337; *McIntyre v. N. Y. Cent. R. R.*, 37 Id. 291; *Merrill v. Ithaca & Oswego R. R. Co.*, 16 Wend. 598.

PHYFE v. RILEY.

[15 WENDELL, 248.]

REDEMPTION OF LANDS SOLD UNDER EXECUTION may be made by the trustees of an absent debtor; but, by such redemption, the trustees acquire no greater rights or powers than the defendant himself would have, had he redeemed.

A STRANGER IS NOT ENTITLED TO REDEEM; but should the purchaser at the execution sale permit it, he would be considered as acting on behalf of the execution defendant.

A MORTGAGEE IN POSSESSION AFTER CONDITION BROKEN is considered as having the legal estate, and may defend in ejectment.

EJECTMENT. The opinion states the case. Verdict for the plaintiff, subject to the opinion of the court.

J. W. Gerard, for the plaintiff.

H. Brewster, contra.

By Court, SAVAGE, C. J. The defendant presents three points of defense: The first is, in substance, that the plaintiff had no title; second, title in himself from E. Burke, through Dennis; third, that he is mortgagee in possession. The plaintiff's title depends upon the effect of the sheriff's deed. The sale by the sheriff seems to have been regular. He had in his hands three executions issued upon three judgments; one of which, in favor of Joseph Burke, appears to have been satisfied long before; the others appear to have been subsisting liens:

and by virtue of all these the sheriff sold the interest of Edward Burke, the defendant in the executions, on the twelfth May, 1831. The plaintiff became the purchaser, and the sheriff gave him the certificate required by law. Previous to this sale, trustees had been appointed by virtue of proceedings against Edward Burke as an absent debtor; and those trustees, on the thirty-first December, 1831, paid the plaintiff three hundred and forty-six dollars and seventy-six cents, being his purchase money with ten per cent. interest thereon, as appears by his receipt set forth in the case. This payment was made by way of redemption under the statute, as appears by the notice of the trustees to the sheriff, dated on the day of the payment of the money. The question is, what was the effect of that redemption? By the statute there are two classes of persons entitled to redeem; and there are two kinds of redemption, the consequences of which are very different. The first class of persons entitled to redeem, consists of the defendant in the execution and all persons claiming an absolute title under him, as his heirs, devisees, grantees, or those who shall have acquired title by deed, sale under mortgage, or execution, or by any other means, to the premises sold: 2 R. S. 370, sec. 46. The trustees, in cases of proceedings against non-resident debtors, etc., by virtue of their appointment and oath, it is declared by statute, shall be deemed vested with all the estate of the debtor from the first publication of the notice: 2 R. S. 15, sec. 3, and 41, sec. 6, sub. 1. All the title which E. Burke had in the premises, therefore, became vested in the trustees, and they were for the purpose of redemption, grantees within the statute. The defendant or his heir, devisee, grantee, etc., may redeem within one year: Sec. 45.

In this case the trustees did redeem within one year. The second class of persons entitled to redeem consists of judgment creditors and their assignees, who may redeem after the expiration of the year allowed to the defendant and his grantees, and before the expiration of fifteen months after the sale. When the redemption is made by the defendant or his heirs, devisees, grantees, etc., the sale of the premises so redeemed, and the certificates of such sale, shall be null and void: sec. 49; the proceeding is at an end. When the redemption is made by creditors, the redeeming creditors, on the contrary, acquire all the rights of the original purchaser, but liable to have the property taken from them on certain conditions, by certain other creditors, in the manner particularly pointed out by sec-

tions 51, 55, etc. In such case the sheriff's sale remains effectual, and is to be consummated by a deed to the redeeming creditors. The trustees in this case, by redeeming, acquired no greater rights or powers than the defendant himself would have acquired, had he redeemed. The sheriff's sale and certificate became void, and no other proceeding could be founded upon it. The deed subsequently executed by the sheriff was inoperative and void, as much so as if he had given a deed without any sale or certificate. The plaintiff therefore did not show any title in himself. I might stop here, without examining the other points in the case, but as they have been argued, and may be operative in the defendant's favor if I should be mistaken in pronouncing the plaintiff's title defective, I will proceed to their consideration.

The next ground assumed by the defendant is, that he has a deed from Edward Burke to Joseph Dennis, and from Dennis to himself. The deed from Burke to Dennis bears date the seventeenth February, 1830, subject to all incumbrances. It was subsequent to all the incumbrances upon the property, but anterior to the issuing the attachment against Burke as an absent debtor. That deed of course overreaches the title of the trustees, and shows that the trustees were not in fact grantees of Edward Burke. He had parted with all his interest in the premises before proceedings were instituted against him; and as he had not title, of course the trustees had none. The plaintiff has introduced parol testimony to show that this deed must have been antedated, as Dennis admitted after the proceedings against Edward Burke were commenced, that he had not purchased Edward Burke's share of the property. This testimony was clearly inadmissible. The counsel seem to suppose that the court will determine the question of fact. A perusal of the thirty-sixth rule of this court will show that there is some mistake on that point, and it will also show that the best way to try a cause is to submit the facts to a jury, and not to endeavor to convert the court into a jury. We have in this case the whole testimony, without a fact found or admitted; but I have thus far considered the facts stated and not controverted as facts found or agreed upon. Considering, therefore, the deed from Burke to Dennis as executed *bona fide* at the time it bears date, the consequences which I have stated follow. It is not necessary to say what is the effect of a redemption by a party who had no interest in the premises. I apprehend it is clear that in case of an attempt to redeem by such a person, the purchaser

would not be obliged to receive the money, but might insist on a deed from the sheriff, when no redemption had been made by any person authorized by the statute to make such redemption; but if the purchaser chooses to receive his money and ten per cent. interest, within a year, must it not be considered as done on the behalf of the defendant in the execution, or his grantee? It certainly can not be tolerated, that the purchaser shall receive his money and interest and yet retain his purchase—that would be unjust. If a stranger, from motives of humanity or any other motive, pays the money, and the purchaser receives it, there should be an end to that sale.

The third point of defense is, that the defendant is the assignee of the mortgage given by Joseph Burke, the admitted source of title, and is in possession. He is therefore mortgagee in possession. Previous to the adoption of the revised statutes, it was well settled that a mortgagee in possession of the mortgaged premises might protect his possession by force of his mortgage: 10 Johns. 480;¹ 7 Cow. 13.²

The revised statutes have not altered the law in this respect, unless it is by way of inference from the provision that no action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises: 2 R. S. 312, sec. 57. The cases deciding that a mortgagee might protect his possession by means of his mortgage, do not give as a reason for that decision that the mortgagee might recover possession in an action of ejectment; nor do the revised statutes necessarily alter the law as to the interest vested in the parties to the mortgage; they merely affect the remedy. Formerly, a mortgagee after forfeiture might pursue several remedies at the same time, and by so doing subject the mortgagor to unnecessary costs. The legislature may have intended merely to prevent oppression; they certainly did not intend to give an exposition of the rights of the mortgagor and mortgagee any farther than as to the particular remedy. Much of the difficulty in establishing an uniform rule in relation to mortgages grows out of the fact, that a mortgage has been differently considered in courts of equity and courts of law. In the former it is merely a security for money, in the latter it has been understood sometimes as a conveyance upon condition. In courts of law, in this state particularly, the mortgagor is considered the true owner against all the world except the mortgagee; and even the mortgagee

1. *Jackson v. Minkler*.

2. *Jackson v. Bowen*.

has been considered merely an incumbrancer until forfeiture of the condition by non-payment of the money. Then and not till then is he considered as having an interest in the land; then, formerly, he might claim the possession by an action of ejectment, and upon the trial prove the condition broken, and thus show a complete title. Now by the revised statutes, the mortgagee must complete his title by other proceedings before he brings his suit; but if the mortgagee, after forfeiture, obtains possession in some legal mode other than by an action, why should the mortgagor or those claiming under him recover the possession from the mortgagee without paying the money secured by it? He is still considered as having the legal estate after condition broken; having that estate and being in possession, what reason can be given why he should be turned out of possession? Is it that he may be put to the trouble and expense of foreclosing his mortgage and then bringing his ejectment?

Such, surely, can not be the policy of the law; on the contrary, litigation and expense to parties will be saved by permitting the mortgagee to retain possession, until the mortgagor or those claiming under him shall institute proceedings in a court of equity for the purpose of redemption. It has been decided that the estate of the mortgagor, before foreclosure, is a legal estate which may be sold on execution: *Waters v. Stewart*, 1 Cal. Cas. in Err. 66, 70. In *Jackson v. Willard*, 4 Johns. 41, it was decided that the interest of a mortgagee, after forfeiture and before foreclosure, can not be sold on execution while the mortgagor is in possession. Kent, C. J., says: "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action." "When the mortgagee has taken possession of the land, the rents and profits may, perhaps, then become the subject of computation and sale." It can not be denied that the mortgagee has an interest in the mortgaged premises, and that interest after forfeiture is a legal interest; it is indeed inchoate until foreclosure, but it has heretofore been considered sufficient to protect him in the possession of the mortgaged premises when legally obtained. Being unable to see in the revised statutes anything which changes this rule of law, I am unwilling to depart from previous adjudications, unless I can perceive a clear intention of the legislature to change the rule.

On the whole case, therefore, it seems to me that the defendant is entitled to judgment.

A MORTGAGEE IN POSSESSION AFTER FORFEITURE may retain the possession as against the mortgagor, and defend the same in an action of ejectment brought by the mortgagor. On this proposition the principal case is followed in *Madison Av. Bap. Church v. Oliver St. Bap. Church*, 73 N. Y. 94; *Hubbell v. Sibley*, 50 Id. 472; *Hubbell v. Moulson*, 53 Id. 427; *Trim v. Marsh*, 54 Id. 610; *Chase v. Peck*, 21 Id. 586; *Mickles v. Townsend*, 18 Id. 584; *Pell v. Ulmar*, Id. 142; *Miner v. Beekman*, 50 Id. 344.

MUMFORD v. WHITNEY.

[15 WENDELL, 380.]

ON AN EXAMINATION AS TO THE CONFESSION of a party, the whole confession must be taken together.

IDEM.—BUT A PARTY CAN NOT DRAW OUT HIS OWN DECLARATIONS upon a subject on which the opposite party has not examined the witness.

COPY OF AN UNEXECUTED DRAFT of an agreement is not admissible in evidence.

A WITNESS, OFFERED TO PROVE A LICENSE, may be asked whether or not it was understood by the parties that it was conditional.

A LICENSE IS AN AUTHORITY TO DO A PARTICULAR ACT upon another's land; is founded in personal confidence, and is not assignable; it gives no interest in the land, and may rest in parol.

IDEM.—But a permission to erect and maintain a dam on another's land so long as there shall be employment for the water power, can not be given by parol, but must be in writing.

ACTION on the case for the flowing of lands by the erection of a dam by the defendant in the Genesee river. The dam was erected in 1826, abutting upon the land of the plaintiff, and partly placed upon it. The defendant proved a parol license from the plaintiff for the erection of the dam, and insisted that he had recognized its existence in deeds executed by him. In support of his position, the defendant gave in evidence: 1. A deed from the plaintiff to one Felt, bearing date December 1, 1825, conveying a mill site on a canal situate on the westerly side of the river, which was supplied with water from the westerly channel of the Genesee river, formed by an island near Rochester, owned by the plaintiff, together with the privilege of taking such proportion of the water as the width of the lot conveyed bore to the whole length of the line of the canal; to be held and enjoyed in common with the other proprietors upon the canal, and subject to a proportion of the expense of the repair; 2. A contract, dated December 2, 1825, whereby the plaintiff agreed to convey unto one Silas Ball a lot on the same canal, with the same rights and restrictions as specified in Felt's deed; 3. A deed from the plaintiff to Sidney S. Allcott,

dated seventh April, 1828, conveying another lot on the canal with like privileges and conditions. Defendant then proved that these lots were supplied with water by means of his dam. To rebut this evidence, the plaintiff showed that prior to 1826 the canal mentioned in the plaintiff's deeds was supplied with water by means of a dam erected across the Genesee river in 1812, at the upper or southerly end of the island owned by the plaintiff, the half of which dam was cut away in 1824, by one Solomon Cleveland, an owner of property on the east side of the river, who then erected a dam near the lower or northerly end of the island, which, after being carried off by a freshet, rebuilt, and again swept away, was replaced in 1826 by the dam in question. The plaintiff also proved that the deed to Allcott was executed pursuant to the terms of a contract entered into between him and Allcott, in October, 1825, and that the description of the lot and the water privileges, as expressed in the deed, were taken *verbatim* from the contract. Among other questions arising at the trial was the following: It appeared that in 1824 an agreement was entered into between the plaintiff and Cleveland, who cut away the old dam in 1824, in respect to the building of a dam on the site of the present dam; that the agreement was reduced to writing, but not executed; that Cleveland showed a copy to others interested in the matter, and soon afterwards commenced the erection of the dam. The agreement thus reduced to writing was offered in evidence, but was rejected. The witness who had given this account of the written agreement also testified that Cleveland, at the time, agreed to construct a stone wall along the east line of the island to protect it from injury; he was then asked, by plaintiff's counsel, whether it was understood between the plaintiff and Cleveland, that Cleveland should not build the dam, unless he built a wall to secure the island. Defendant's objection to this question was sustained. Verdict for the defendant.

J. C. Spencer, for the plaintiff.

F. M. Haight and D. D. Barnard, *contra*.

By Court, SAVAGE, C. J. The questions are: 1. Whether the defendant was entitled to prove his own declarations, made in the same conversation about which the plaintiff had examined the witness; 2. Whether the copy of the agreement reduced to writing, but not executed, should have been received in evidence; 3. Whether the witness should have been permitted to testify as to the license being conditional; 4. Whether a parol license

in this case is valid; 5. Whether the deed to Allcott was a recognition of the dam erected by the defendant.

1. It was said by this court in *Fenner v. Lewis*, 10 Johns. 45, there is no principle in the law of evidence better settled, than that if you will examine as to the confession of a party, you must take the whole confession together; you can not take part and reject part. The same rule is laid down in treatises upon evidence: 1 Ph. Ev. 84, ed. of 1823; see also 3 Johns. 427;¹ 11 Id. 161.² The case of *Fenner v. Lewis* exemplifies the rule. The plaintiff wished to prove that he had delivered or offered a pair of horses to his wife, who lived separate from him. The defendant, to disprove the fact, called a witness, who testified that he saw the horses in New York, and being asked by the defendant whether the plaintiff did not say that he wanted to sell them, answered that he did; but added that the plaintiff assigned as a reason, that he had offered them to Mrs. F. and she would not receive them, and he must do something with them. In the present case it does not appear what question the plaintiff put to the witness, only that it was concerning the erection of the dam, and about the time of its erection. The plaintiff's counsel insisted that the defendant was not entitled to draw out his own declarations upon a distinct subject, although made in the course of the same conversation. The rule must certainly have some such limitation; it could not be tolerated, that a party could thus draw out his own declarations upon a subject on which the opposite party had not examined the witness. But in this case the subject-matter of the inquiry by the plaintiff was what the defendant had said concerning the erection of the dam; and his answer probably was, that he had built it—and he then assigned the reason by his cross-examination, viz., because the plaintiff had assented to it; without such assent, he would have had no right to do the act. It seems to me that the cross-examination was proper, and within proper limits; certainly as much so as when *Fenner* proved by his declarations the fact that his wife refused to receive the horses. So where the defendant said he had borrowed the money, but that he had repaid it.

2. The judge, in my opinion, properly rejected the copy of the draft of an agreement between the plaintiff and Solomon Cleveland. It was evidently not completed, as Cleveland took it to consult the other proprietors about it.

3. It was proved, without objection, that it was agreed by Cleveland that he would protect the plaintiff's island by a

1. *Carver v. Tracy*.

2. *Hopkins v. Smith*.

wall extending from the dam to the bridge, and that while Cleveland was building the wall, the plaintiff told him that the dam must not be built, unless the wall along the east line of the island was made. The question, whether it was understood between the plaintiff and Cleveland, that Cleveland should not build the dam unless he built a wall to secure the island, was rejected. The question was proper. Whether license had been given, was the point of inquiry; and if the plaintiff could prove that the license was conditional, and that the condition had not been performed, then he was absolved from the license; or rather the license was never operative, because the condition upon which it depended had not been performed.

4. Suppose, however, the license to have been properly and fully proved, was it valid and available as a defense to this action? Did it purport to convey an interest in or concerning the lands of the plaintiff, which required an agreement in writing? The ninth section of the statute of frauds of 1813, 1 R. L. 78, sec. 9, declares that all leases, estates, interest of freehold or terms of years, or any uncertain interests of, in, to, or out of any lands, made by parol and not in writing, shall have the effect of estates at will only. This clause excepts leases for three years. The tenth section declares that no such interest shall be assigned, granted, or surrendered, unless in writing. The eleventh section declares that no action shall be brought upon any contract for sale of lands, or any interest in or concerning them, unless the agreement be in writing. It must be conceded that the decisions on the question, what is an interest in lands within the meaning of the statute, are not easily reconcilable with the statute or with each other.

In an old case, before the passing of the 29 Chas. I., *Webb v. Paternoster*, Palm. 71, a license was given to a party to erect a stack of hay till he might conveniently sell it; it stood two years, and then a lease of the land was granted to a stranger, who gave notice to remove it, and half a year after turned his beasts into the field, who ate the hay; yet, because of the convenient time to remove, the judgment was for the defendant: Vin. Abr., tit. License, F., pl. 2. Upon the authority of this case, it is said by Mr. Sugden, Sug. Vend. 56, the case of *Wood v. Lake*, Say. 3, was determined. There was a parol agreement to stack coals on part of a close for seven years, with the use of that part of the close. The court held the agreement good.

They said the agreement was only for an easement, and not for an interest in the land; it did not amount to a lease, and it was held good for seven years. It has been held that timber growing may be sold by parol: 1 *Ld. Raym.* 182;¹ but grass growing can not, because such a contract is a sale of an interest in, or at least an interest concerning lands: *Crosby v. Wadsworth*, 6 East, 611. So also that a sale of turnips growing must be in writing: 2 Taunt. 38;² but in the case of *Parker v. Staniland*, 11 East, 362, a parol sale of potatoes in the ground was held valid, and not within the statute. The difference between this case and *Crosby v. Wadsworth*, as stated by Lord Ellenborough, is this: that in that case the contract for the grass was made while growing, but the contract was for the potatoes in a matured state. The grass was to grow before cut, but the potatoes were to be removed immediately. In this court, however, it has been expressly adjudged that wheat or corn growing is a chattel, and may be levied on and sold as such by virtue of an execution: 2 Johns. 418, 421;³ 9 Id. 112;⁴ 9 Cow. 42.⁵

The case of *Crosby v. Wadsworth* was doubted by Spencer, J., in *Frear v. Hardenbergh*, 5 Johns. 276 [4 Am. Dec. 356], where he remarks that the statute could have in view, to avoid such agreements in relation to lands as rested in parol, only where some interest was to be acquired in the land itself, and not such as were collateral, and by which no kind of interest was to be gained by the agreement, in the land. A license to enter upon land does not purport to convey an interest in the land; it is substantially a promise, without any consideration to support it, and while it remains executory, may be revoked at pleasure; but when executed, it in general can only be revoked by placing the other party in the same situation, in which he stood before he entered on its execution. So a promise to give may be rescinded before execution, but not after. It is said, however, that if a rule of law would be transgressed by holding an executed license irrevocable, it can not be done; the law must stand and the license be revoked: Ham. N. P. 207. In the case of *Winter v. Brockwell*, 8 East, 308, the plaintiff complained that the defendant had placed a skylight over an opening area above the plaintiff's window, by means of which light and air were prevented from entering. The defense was, that the area belonged to the defendant's house, and

1. *Littlewood v. Smith*.
2. *Emmerson v. Hoelle*.

3. *Whipple v. Foot*; 8 C., 3 Am. Dec. 442.
4. *Stewart v. Doughty*. 5. *Austin v. Lawyer*.

the skylight was put over it by the express consent and approbation of the plaintiff before the inclosure, who, after it was done, gave notice to have it removed. Lord Ellenborough, before whom the cause was tried, was of opinion that the license of the plaintiff having been acted upon and expense incurred, it could not be recalled without offering to pay all expenses incurred under it. The defendant had a verdict, and a new trial was denied. On the trial, the question was raised, whether a parol license, as this was, was good by the statute of frauds, but it was overruled. In *Taylor v. Waters*, 7 Taunt. 374, it was held that a beneficial license to be exercised upon land may be granted without deed and without writing. The plaintiff was the bearer of an opera ticket, which gave him admission to the opera house for twenty-one years, and was denied admission by the defendant, for which an action was brought. One ground of defense was, that this was an interest in land, and could not pass without a writing. To this it was answered that it was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges thereon, and therefore need not be in writing; and of this opinion was the court. Chief Justice Gibbs cited the cases of *Webb v. Paternoster*, *Winter v. Brockwell*, and *Wood v. Lake*, and remarks: "These cases abundantly prove that a license to enjoy a beneficial privilege on land may be granted without deed, and notwithstanding the statute of frauds, without writing." These cases relate to some privilege to be exercised upon the land. The case of *Fentiman v. Smith*, 4 East, 108, decides that a parol license to make a tunnel through the defendant's land, to carry water to the plaintiff's mill, was revocable at any time. The defendant had agreed, for the consideration of a guinea, to be paid by the plaintiff, to let the plaintiff lay a tunnel through his land for carrying the water; and even assisted in making it; but there was no conveyance. The guinea was afterwards tendered, but the defendant refused to receive it, and cut a channel by which the water was diverted. Lord Ellenborough says, the title to have the water flowing in the tunnel over the defendant's land could not pass by parol license, without deed; and if by license, it was revocable at any time. A case in some respects resembling the last is found in 14 Serg. & R. 267.¹ Kern sued Rerick, in a court of common pleas, for diverting a water-course, in consequence of which he lost the use of his saw-mill. It appeared that before he built his mill he applied to Rerick for

1. *Rerick v. Kern*; S. C., 16 Am. Dec. 497.

permission to turn the water from what was called the right-hand stream into the left-hand stream, which, without the water of the former, would have been wholly insufficient; permission was given to turn the stream through R.'s land, but no deed was given, nor any consideration paid; a mill was built on the left-hand stream, which would not have been done but for the permission to turn the water. Subsequently R., the defendant below, turned away the water of the right-hand stream. The court below decided, in substance, that the license might have been revoked before Kern had incurred the expense of building his mill, on the faith of Rerick's promise; or he might have revoked it, if it had been given after the mill had been built, but not after he had induced Kern to be at the expense of building his mill. Upon a writ of error brought into the supreme court, the plaintiff's counsel relied upon the above case of *Fentiman v. Smith*, and *Dexter v. Hazen*, 10 Johns. 246, where the defendant, having given permission to the plaintiff to pass over his land with teams, revoked it; and the court said that it was a mere license, gratuitously given, and revocable at pleasure, being still executory. On the other side it was contended that the license was irrevocable, after expense had been incurred upon the faith of such license; and it was compared to a parol gift of land, accompanied with possession, and also that it was a fraud for Rerick to witness the expenditure of money upon his land, and afterwards revoke his license. Gibson, J., gave the opinion of the court, and held that a license may become an agreement, on valuable consideration, as when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. He held that equity would decree the specific performance of such an agreement. That a right, under a license, when not specially restricted, is commensurate with the thing of which the license is accessory; that relating to a permanent eviction, it was of unlimited duration. It had been previously decided in that court, in the case of *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, that after the execution of a deed, conveying a right to lay down pipes to conduct water through the granted land by courses and distances, the route might be altered by parol, and be valid, after it was carried into effect.

This subject has been viewed very differently by the supreme court of Massachusetts, in *Cook v. Stearns*, 11 Mass. 536. That was an action of trespass, for entering upon the plaintiff's close, and digging up his soil. The defendant pleaded that he was

the owner of a mill and dam, near the plaintiff's close; part of the dam being made upon the plaintiff's close, by the consent of the then owners; and that it was necessary to repair the same, and the defendant entered for the purpose of repairing. The plaintiff demurred, assigning for cause, that there was no conveyance. For the defendant it was, among other things, contended that there was a license, which being once executed was not revocable. Parker, C. J., gave the opinion of the court, and states the defendant's claim a permanent interest in the plaintiff's close; a right to maintain the dam and canal, which was formerly placed there by consent; and to enter at any time, to make repairs. This, he says, is an interest in lands which can not pass without deed or writing. The counsel for the defendant had contended that such a license might be by parol, and that it could not be countermanded. The learned judge says: "This argument had some plausibility in it, when first stated; but upon more mature consideration it seems to have no foundation in principles of law. A license, he says, is technically an authority given to do some one act, or series of acts, on the land of another, without passing any estate in the land: as to hunt, to cut down trees; these are, when executory, revocable, but not when executed; but licenses which, in their nature, amount to the granting of an estate, for ever so short a time, are not good, without deed, and are considered as leases, and must be pleaded as such." He adds: "The distinction is obvious. Licenses to do a particular act do not, in any degree, trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass; but a permanent right to hold another's land for a particular purpose, and to enter upon it at all times, without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute." He concedes that the license authorized the particular act, but not a repetition of it; and says, that the transfer of the land to another was a countermand of the license.

The court held the plea bad, not showing such a license as may be pleaded, and the interest claimed being not in the nature of a license, but of an estate, or at least an easement in the land, which can not be acquired without writing or prescription, or such a possession as furnishes a presumption of a grant. If the plea were held to be a bar to the action, all the

mischiefs and uncertainties which the legislature intended to avoid, by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not on the land which they purchase. In *Ex parte Coburn*, 1 Cow: 570, this court said, that a right of way is a real or chattel interest, according to the term of its duration, and the former is well known as an incorporeal hereditament; not so of a license to enter upon another's land, without consideration. This is not an interest, it is a mere authority, revocable at any moment; not in its nature assignable, but limited to the person of the grantee. Giving permission to walk over one's land is but an excuse for a trespass. The case of *Thompson v. Gregory*, 4 Johns. 81 [4 Am. Dec. 255], has been much relied on by the plaintiff's counsel, as containing the principle for which he contends. Thompson sued Gregory, for damages for overflowing his land, by means of a dam on Gregory's own land. The defense set up was, that S. Van Rensselaer had leased both plaintiff's and defendant's land, and reserved to himself and his assigns the privilege of building dams and flowing lands, and that this right had been assigned by parol to the defendant. The court say the right in question could not pass by parol; the right reserved to the grantor was an incorporeal hereditament. It was not the land itself, but a right annexed to it, and it could only pass by grant. No such interest could be assigned or granted without writing, according to the express provision of the statute of frauds. And in *Jackson v. Buel*, 9 Johns. 298, it was held that ejectment would lie by the grantor for such a reservation.

Chancellor Kent, in his commentaries, 3 Kent Com. 452, says, that the modern cases distinguish between an easement and a license. A claim for an easement must be founded upon grant, by deed or writing, or upon prescription which presupposes one, for it is a permanent interest in another's land, with a right, at all times, to enter and enjoy it; but a license is an authority to do a particular act or a series of acts upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable. This distinction between a privilege or easement carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, and it becomes difficult, in some of the cases, to discern a substantial difference between.

I shall not undertake to reconcile these various cases. It is evident the subject has been understood very differently by different judges. But in this all agree, that according to the statute of frauds, any permanent interest in the land itself can not be transferred, except by writing. Much of the discrepancy may have arisen from the different ideas attached to the word license. If we understand it as Chancellor Kent defines it, it seems to me there can be no difficulty. It is an authority to do a particular act upon another's land; is founded in personal confidence, and is not assignable. For example, A. agrees with B. that B. may hunt or fish on his, A.'s land; A. thereby gives B. a license for that purpose. This gives B. no interest in the land; he can not authorize any other person to go upon the land; it is a personal privilege granted to B. alone. If, after A. has given his consent, and before B. has entered upon his land, A. changes his mind, he has a right to do so, and forbid B. from entering upon his land for the specified purpose. The license is thus far executory, and may be revoked at pleasure; if B. afterwards enters, he is a trespasser. If, however, B. enters before any revocation of the license, the license is then executed; and it is not competent for A. to revoke it, and make B. a trespasser. This doctrine is applicable only to the temporary occupation of land, and confers no right nor interest in the land. If A. agrees with B. that he may enter upon his land, and occupy it for a year, that is not, properly speaking, a license merely; it is more—it is a lease, and if no term be specified in the agreement, it is an estate at will.

If the period of occupation expressed or implied previous to 1830, was more than three years, it required an agreement in writing to support it. If there was no written agreement, the right of occupancy could certainly not extend beyond three years. Where an interest greater than a temporary occupation was to be created, it might be an easement, as a right of way; such an easement is, or may be, a permanent interest in the land over which the right of way exists, and must be founded upon grant or prescription, which supposes a grant. Such an interest is not properly a license; it may be assigned, and can not be revoked. If A. agree with B. that B. may build a dam upon the land of A., or across an island, as in the present case, if it is to be permanent, or anything more than a mere temporary erection, such an agreement is not technically a license. The object of A. is to grant, and of B. to acquire an interest

which shall be permanent; a right not to occupy for a short time, but as long as there shall be employment for the water-power to be thus created; can such an interest, such a right, be created by parol? As Mr. Sugden says of the case of *Wood v. Lake*, "It appears to be in the very teeth of the statute which extends generally to all leases, estates, or interests." It declares that all leases, estates, interests of freehold, or terms of years, or any uncertain interests, of, in, to, or out of any lands, made by parol, and not in writing, shall have the effect of estates at will only. To decide that a right to a permanent occupation of the plaintiff's land may be acquired by parol, and by calling the agreement a license, would be in effect to repeal the statute. The only other question arising upon the bill of exceptions is whether the judge was correct in charging the jury that the conveyance by the plaintiff to Allcott of mill privileges, and the right of using water on the canal and race, referred to and adopted the means of furnishing water to that canal as they existed at the date of the deed, and that as the present dam was then erected, the deed was a full confirmation and recognition of that dam.

A reference to the terms of the deed to Felt, will show that the subject of that conveyance was the privilege of the water-power which was created, in part, by means of a dam. The purchaser was of course entitled to the privilege, to the full extent of which it was capable of enjoyment at the time of the purchase; that is, he was entitled to raise the water to the height at which it was at the time of the purchase and sale. If the grantor suffered any inconvenience from the flowing of the water upon his lands, no action would lie for such damages. The grantee would not, however, be authorized in raising the water higher; nor, as I apprehend, would he be justified in building a dam in another place. For instance, when the deed to Felt was executed, I will suppose that there was no dam but the old dam at the head of the island (though the fact, I believe, was otherwise); in that case the grantee would have no right to build a dam at any other place, unless it became absolutely necessary; nor could he raise the water higher than it might be raised by the dam existing at the time of his purchase. At the time of Felt's purchase, Cleveland's dam was the only one which supplied water to the water lots. Felt's deed recognized, of course, that dam; and gave him his proportion of all the benefit to be derived from the head of water which it furnished. In the same manner the deed to Allcott, bearing

date in 1828, after the erection of the dam of 1826, gave to the grantee the benefit of that dam. Whether it is higher or lower than Cleveland's dam, the case, I believe, does not inform us; nor is it important to the decision of this point. It is contended, on the part of the plaintiff, that the extent of the privilege conveyed by this deed is to be ascertained by the contract which was entered into in October, 1825; that the deed, being executed in fulfillment of that contract, it must be construed in reference to it; and to the state of the privilege then existing.

If the dam of 1826 had been less favorable to the grantee than that of 1825, the purchaser would no doubt be entitled to the full benefit of his purchase; and would be authorized to raise the dam to the height of that of 1825. But if the dam in 1828, when the plaintiff conveyed to Allcott, was higher than in 1825, when the contract was made, and the plaintiff has conveyed all the water privilege then enjoyed, I apprehend he is not at liberty to diminish the privilege thus granted. A deed is construed most strongly against the grantor. If there has been any mistake, it can not be corrected in this court, but resort must be had to the court of chancery. There is no pretense of fraud or imposition upon the grantor, in relation to the execution of the deed: 5 Wend. 525;¹ 7 Cow. 266.² It seems to me that the deed of 1828 is a recognition of the dam of 1826; the plaintiff can not deny the proper and lawful existence of the dam as it stood at the date of that deed. The right to maintain the dam is granted by the deed; the dam is therefore no nuisance as to the plaintiff. He has recognized it and conveyed to Allcott all the water privileges created by it, and is not at liberty to treat it as a nuisance. On the whole case, therefore, there is no reason for granting a new trial.

LICENSE.—The principal case is a leading authority in regard to the subject of license, and is followed in New York on the various propositions which it decides: as to the definition of a license, in *Dolittle v. Eddy*, 7 Barb. 78; that a parol license is valid: *Pierrepoint v. Barnard*, 5 Id. 372; *Houghtaling v. Houghtaling*, Id. 383; *Dubois v. Kelly*, 10 Id. 507; as to the revocability of licenses: *Boyce v. Brown*, 7 Id. 90; *McCaffrey v. Wooden*, 62 Id. 325; *Phelps v. Nowlen*, 72 N. Y. 43; *Merrill v. Calkins*, 73 Id. 584; that under the guise of a parol license a permanent interest in lands can not be created: *Rathbone v. McConnell*, 21 N. Y. 472; *Selden v. Del. and Hud. Canal Co.*, 29 Id. 639; *Babcock v. Utter*, 1 Keyes, 405; *Miller v. Auburn and Syracuse R. R. Co.*, 6 Hill, 62; *Brown v. Galley*, Hill & D. 310; *Dubois v. Kelly*, 10 Barb. 507; *Eggleston v. N. Y. and Harlem R. R. Co.*, 35 Id. 174; and that it is compe-

1. *Oakley v. Stanley*.

2. *Stiles v. Hooker*.

tent to show a license to have been created conditionally: *Pratt v. Ogden*, 34 N. Y. 22.

The subject of the creation and nature of license will be found discussed in the notes to *Ricker v. Kelly*, 10 Am. Dec. 38, and *Rerick v. Kern*, 16 Id. 497, and in *Gilmore v. Wilbur*, 22 Id. 410; *Baker v. Boston*, Id. 421; *Joy v. Hull*, 24 Id. 625; *Hathorn v. Stinson*, 25 Id. 228, where the question of license to flow lands of another is considered: *Woodbury v. Parshley*, 26 Id. 739; *Putney v. Day*, 25 Id. 470.

BLUNT v. AIKIN.

[15 WENDELL, 522.]

AN ACTION ON THE CASE FOR FLOWING LANDS will not lie against the person who erected the mill, where, at the time of the injury, the mill was in the possession of another, not a tenant to the former.

ACTION on the case for injury occasioned by a dam built by the defendant, whereby the plaintiff's land was overflowed. At the time of the damage, the mill and dam were in the occupancy of the defendant's sons, claiming as their own. Nonsuit granted. Motion for a new trial.

S. Stevens, for the plaintiff.

S. Cheever, contra.

By Court, SAVAGE, C. J. The judge nonsuited the plaintiff on the ground, as is supposed, that an action would not lie against the defendant, as he was not in possession of the mill and dam when the injury was done for which the suit was brought. The plaintiff moves for a new trial, and asserts the principle that this action lies against the person who caused the dam to be erected, although he may have transferred it to another, and such other be in possession at the time of the injury complained of. For the purpose of the argument I shall assume, what seems to me to have been sufficiently proved, that the defendant erected the dam in 1812, that he caused it to be raised higher by three or four feet in 1818, and that in consequence of the raising of the dam the injury was done to the land of which the plaintiff subsequently became owner. I shall also assume, that before the plaintiff became the owner of the premises in question, the defendant had divested himself of the possession of the dam and mill. The case does not show any connection between the defendant and his sons, in relation to the occupancy of the mill. Had the relation of landlord and tenant been shown, that might have varied the question.

The plaintiff's counsel, to sustain his proposition, refers us to the case of *Rosewell v. Prior*, 2 Salk. 460. That was an action on the case for stopping up the plaintiff's ancient lights. The defendant, tenant for years, erected the nuisance, and afterwards made an under-lease to J. S. The question was, whether an action would lie against the defendant for the continuance after he had made an under-lease; there had already been a recovery against him for the erection. The court said the action lay, because he transferred it with the original wrong, and his demise affirms the continuance of it. The case is much more fully reported in 1 Ld. Raym. 713. It there appears expressly, that the defendant had demised the new house to one Shuttleworth, rendering rent. The cause was several times argued by distinguished counsel. For the defendant it was argued, that the action should have been brought against the tenant in possession, as the injury which the plaintiff sustained proceeded from him, and not from the defendant. The court admitted that the action would lie against either the defendant or his lessee, and observed that it was reasonable that the action should lie against the defendant, because he erected the nuisance, for some time continued the enjoyment, and then demised it to S., rendering rent; thereby agreeing that it should continue, and he has a rent for it. We are also referred to *Penruddock's case*, 9 Co. 101.¹ That was a case of *quod permittat prosternere*, between Clark, plaintiff, and Penruddock, defendant. The case was this: John Cosk built a house on his own ground, so near the curtilage of the house of Thomas Chichely, that it hung over three feet of the said curtilage, and threw the water upon Chichely's premises. Chichely conveyed his house to Clark, and Cosk conveyed to Penruddock. The first question was whether the action lay for the feoffee. It was resolved that the dropping of the water was a new wrong, and that the action lay by the feoffee of Chichely against the feoffee of Cosk, if the nuisance be not reformed after request made; but against him who did the wrong, the action lies without request. It was held, too, that the feoffee might abate the nuisance, even before prejudice; for it was reasonable that he should prevent the prejudice, and not stay till it be done.

So too it was held in *Beswick v. Cunden*, Cro. Eliz. 402, 520, that an action on the case did not lie for a nuisance, because the plaintiff might have his remedy by an assize or *quod permittat*. That was an action on the case, for that the defendant

1. 5 Co. 101.

erected a dam in a certain river whereby it surrounded the land of J. S., who afterwards enfeoffed the plaintiff thereof. To this declaration there was a demurrer, and held as above that this action did not lie. The proceedings in an assize of nuisance, and *quod permittat prosternere*, are now obsolete. It may, however, be proper to remark, that the assize of nuisance was a writ commanding the sheriff to summon an assize, that is a jury, and view the premises, and have them at the next assizes, that justice may be done. If the plaintiff succeeded, he had judgment: 1. That the nuisance be abated; 2. To recover damages. This action originally lay against the wrong-doer himself, but not his alienee. That was remedied by the statute of W. 2. Before this statute, the party injured by a nuisance which was aliened, was driven to his *quod permittat*, which was in the nature of a writ of right, and commanded the defendant to permit the plaintiff to abate the nuisance, or show cause why he will not. This writ lay as well between the parties to the nuisance as their alienees. Both these remedies are superseded by the action on the case, in which damages alone are recoverable, but not judgment to abate the nuisance. In this action possession alone is sufficient to be shown; and it lies by the person in possession against another who has like possession. In this respect it differs from those proceedings in the nature of real actions, where it was necessary that the freehold should be in the plaintiff and defendant respectively: Jac. Law Dict., tit. Nuisance, III, 1, 2, 3. The case of *Cheetham v. Hampson*, 4 T. R. 318, was a case somewhat analogous. That was an action on the case against the defendant, who was owner of the fee, for not repairing the fences of a close, whereby the plaintiff sustained damage. Another person was in possession, but the plaintiff had a verdict.

Lord Kenyon said it was clear that the action could not be supported against the owner of the inheritance when the possession was in another person. It was notoriously the duty of the occupant to repair the fences, so that the landlord might maintain an action for neglect, without any agreement for that purpose, upon the ground of an injury to the inheritance. Buller, J., said that with respect to the case of *Rosewell v. Prior*, which was the only one cited where the action was maintained against the owner out of possession, it was very distinguishable, for there the defendant let the premises with the nuisance upon them which had been before erected; and he remarks, that the court relied upon the fact that he had been

guilty of the misfeasance, and affirmed the continuance of the nuisance, which might be said to be a continuance by himself. It would seem, therefore, that had it been shown that the defendant in this case had rented the premises to his sons, an action might be maintained against him. A question might perhaps arise, whether the present plaintiff could maintain the action, as he had no interest in the premises injured by the nuisance, until some time after the defendant had been out of possession of the nuisance itself. If, however, the receipt of rent is a sufficient affirmation of the nuisance and participation in its continuance to make him liable to any one, he might be held liable to the person injured, either by the original erection of the nuisance or by the continuance of it.

As this case appeared at the trial, the judge decided correctly. Although the defendant had been in possession when the dam was built, and when it was raised, and was therefore, at that time, liable for any damage caused by it; yet, before the plaintiff sustained any damage, he had left the possession, and other persons had assumed it, and were unquestionably liable. Possession is *prima facie* evidence of property, and I apprehend, as against the possessor, conclusive, in so far as any liability is imposed by the fact of possession or ownership; the law will presume the person in possession to be the owner, but there is no presumption of tenancy arising from the fact of succession in possession. If the relation of landlord and tenant existed between the defendant and his sons, it should have been shown; it can not be presumed.

New trial denied.

Followed, in regard to the liability of one who maintains a nuisance which has been erected by another, in *Irvine v. Wood*, 51 N. Y. 230; *Ostenango Bridge Co. v. Lewis*, 63 Barb. 115; *Mayor of Albany v. Ounliff*, 2 Comst. 181.

NUISANCE, ERECTING OR CONTINUING, liability of parties for: See the note to *Plumer v. Harper*, 14 Am. Dec. 336.

SCRUGHAM v. WOOD.

[15 WENDELL, 545.]

A DEED, SIGNED, ACKNOWLEDGED, AND RECORDED, is a complete and valid deed, although there is no evidence of any formal delivery and the instrument is found among the grantor's papers at his death.

EJECTMENT to recover the plaintiff's dower land. The question turned upon the validity of a deed made by the plaintiff's

husband before marriage, by which he conveyed all his real estate to the defendants, in trust for himself during his life and for his children after his death. The deed was signed and acknowledged by all the parties before a commissioner of deeds, and was recorded. It did not appear that there was any formal delivery, and after the grantor's death the instrument was found among the grantor's papers.

S. A. Foote, for the plaintiff in error.

P. A. Jay, *contra*.

By Court, NELSON, J. The facts in the bill of exceptions are abundantly sufficient to justify the charge of the court below, and the verdict of the jury. No one can doubt, from the account of the execution of the deed given by the commissioner, in connection with the previous preparation of it at the instance of Scrugham, that it was the understanding and intent of all parties at the time of the execution and acknowledgment, that it was delivered, or in other words, that the family settlement was complete.

The position to be found in the learned commentaries of Chancellor Kent, vol. 4, pp. 455, 456, that "if both parties be present, and the usual formalities of execution take place, and the contract is to all appearance consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor," is amply sustained by the authorities referred to by him. He had in the case of *Souveryby v. Arden*, 1 Johns. Ch. 240, before fully considered and reviewed all the leading cases on the point, both in law and equity, and in the opinion delivered by him as chancellor, the above proposition will also be found, p. 256. It has received confirmation by subsequent cases, both here and in the English courts: 17 Id. 548, 577;¹ 5 Barn. & Cress. 671.² The position extracted by the reporter from the last case is as follows: "Where a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential."

1. *Jaques v. Methodist Episcopal Church*; 8 O., 8 Am. Dec. 447.

2. *Dec v. Knight*.

It would be useless to go over the cases again, after the review of them in the court of chancery here, and in the king's bench in England, and a concurrence in the same conclusion. Besides, this case is stronger than either of the two to which I have referred, because, as justly remarked in the court below, the grantor was much more interested in the execution and preservation of the deed than either of the trustees; and the fact of its being in his possession at his death, therefore, does not, under the circumstances of the case, necessarily create any presumption against the idea that a delivery was intended at the time of its execution. The facts offered to be proved were properly excluded, as they had no pertinent bearing upon the point in issue. If they proved anything, it was that Scrugham had made special provision, before his death, for the maintenance of the plaintiff after his decease, and tended rather to negative the idea that he expected she would be provided for by means of her dower.

Judgment affirmed.

DELIVERY OF DEED: See *Church v. Gilman*, post, and note. If the usual formalities of execution take place, and the contract under seal is to all appearances consummated without any conditions or qualifications annexed, and the acts of the parties clearly evince their intention to be bound without a formal delivery, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor: *Diets v. Farish*, 53 How. Pr. 224; *Stikwell v. Hubbard*, 20 Wend. 46; *Fulton v. Fulton*, 48 Barb. 591; *McLean v. Button*, 19 Id. 453; *Holliday v. Lewis*, 14 Hun, 480.

FONDA v. VAN HORNE.

[15 WENDELL, 631.]

THE FATHER, AS GUARDIAN BY NATURE, has no right to the possession or use of his child's property.

THE FATHER IS GUARDIAN IN SOCAGE, under the revised statutes, of lands vesting in an infant child.

AN INFANT CAN NOT APPOINT AN AGENT for the sale of her property.

AN INFANT'S SALE OR GIFT OF PERSONALTY, accompanied by a delivery by his own hand, is voidable only.

WHERE AN INFANT'S FATHER exchanged property of the infant, with his consent, for other property which was seized under execution as belonging to the father, the infant's remedy is not in replevin against the creditor. The act of the father was void, and the infant can pursue his original property.

IT IS A TRESPASS FOR A SHERIFF TO LEVY ON ANOTHER'S PROPERTY, taking a receipt and inventory to prevent its removal.

REFLEVIN for two cows and a calf. Hoag, the deputy sheriff, justified under an execution sued out by his co-defendant, Fonda, against A. Van Horne, the father of the plaintiff. It appeared from A. Van Horne's testimony, that one Gross made a gift to the plaintiff, witness' infant daughter, of a cow; that witness, with the plaintiff's consent, sold the cow, and with the proceeds bought two cows from Easterbrooks, one of which afterwards had a calf—being the two cows and calf in dispute. The cows and calf were kept by the plaintiff, and were used by him. Motion for a nonsuit denied. Verdict for the plaintiff. The defendants then sued out a writ of error.

D. Cady, for the plaintiffs in error.

M. T. Reynolds, contra.

By Court, BRONSON, J. Van Horne, the father, had no legal interest in the event of the suit. If the plaintiff recovered, the witness, as her guardian by nature, could have no right to the possession or use of the property. He procured two persons to receipt the goods, but it does not appear that he agreed to indemnify them. Although they acted on his request, it may have been from motives of kindness towards the plaintiff, and without any right to resort to the witness in case of loss. There was sufficient evidence of a trespass, or taking of the goods, to sustain the action. Fonda, the creditor, directed the levy, and agreed to indemnify the sheriff; and Hoag, the deputy, made the levy. An inventory was made of the property, and a receiptor was required to prevent its removal. The defendants exercised dominion over the goods: *Allen v. Crary*, 10 Wend. 349 [25 Am. Dec. 349]. The objection that Van Horne as the guardian of the plaintiff was entitled to the possession of the property, and that the action should have been brought by him, can not be sustained. He was not guardian in socage, for two reasons: 1. It does not appear that the daughter was seised of any lands held by socage tenure; and, 2. As in this state the inheritance may descend to the father, he could not at the common law be guardian in socage to his child: Co. Lit. 88 b, note 67; *Jackson v. Combs*, 7 Cow. 36; S. C., in error, 2 Wend. 153 [19 Am. Dec. 568]. Both of these rules of the common law were modified in the late revision of the statutes. Where an estate in lands becomes vested in an infant, the guardianship of such infant now belongs to the father, with the rights, powers, and duties of a guardian in socage: 1 R. S. 718, sec. 5. But it does not appear that the

plaintiff has in any form an estate in lands; and consequently Van Horne had no rights under this statute. He was guardian by nature to the plaintiff, but this guardianship only extended to the person of his daughter, and gave him no control over her property, real or personal: *Combs v. Jackson*, 2 Wend. 153 [19 Am. Dec. 568]. If the plaintiff owned the property, the action was properly brought in her name.

In relation to the cow which the plaintiff purchased of Putman, no question was made on the trial, nor do I perceive that there was room for any. The mere fact that the father kept the cow and had the use of it, would not make the transaction fraudulent against his creditors. The use of the animal must have been worth more than the keeping, and the creditors of the father could not be injured by such an arrangement between him and his child. The only difficulty in the case is in relation to the cow which Van Horne purchased of Easterbrooks, and gave to the plaintiff in the place of the one he had previously sold. If this must be regarded as a gift on the part of the father, then as he was insolvent at the time, the daughter acquired no title as against his creditors; and if it was a sale instead of a gift by the father, it would be *prima facie* fraudulent as against creditors, because he still retained the possession of the property. It was important, therefore, for the plaintiff to connect this transaction with her title to the cow that was given to her by Gross. The court charged the jury, that if Van Horne merely carried into effect the will of his daughter, by disposing of one cow and procuring for her another as good, as her agent, then the plaintiff was the real owner, and the defendants were not justified in taking the cow. This was, in effect, instructing the jury as matter of law, that the plaintiff, though an infant, could constitute her father an agent for the sale of her property. The charge was in this particular erroneous. The plaintiff could not appoint an agent for the sale of her property. Her will or consent conferred no authority upon her father. She might treat him as a wrongdoer for making the sale, and the purchaser acquired no title. Notwithstanding the attempted transfer, the cow which was the gift of Gross still remained the property of the plaintiff, and she might assert her right to the property in the same manner as though it had been wrongfully taken by a stranger.

What acts of an infant are void, and what are voidable only, is a question which has been very much discussed in the books; and several attempts have been made to lay down some general rule

which should be applicable to all cases; but with no great success. In *Keane v. Boycott*, 2 H. Bl. 511, Lord Chief Justice Eyre laid down the doctrine, that where the court could pronounce the contract for the benefit of the infant, as for necessities, it was good; where the court could pronounce it to be to the prejudice of the infant, it was void; and in those cases where the benefit or prejudice was uncertain, the contract was voidable only. This may answer well enough as a general rule, but it must be subject to exceptions. It may be for the benefit of an infant to appoint an attorney or agent to sell his lands, but such an act would be clearly void. A conveyance by the infant himself, of his lands, may be to his prejudice, and yet, under certain circumstances, the conveyance will be voidable only, and there must be many cases where the act will be void; although it may be uncertain whether it will benefit or prejudice the infant. In *Zouch v. Parsons*, 3 Burr. 1794, Lord Mansfield sanctioned the rule laid down by Perkins, that "all such gifts, grants, or deeds made by infants, which do not take effect by delivery of his hand, are void; but all gifts, grants, or deeds, made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate." He remarked that the words "which do take effect," were an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest. A conveyance by lease and release executed by the infant, was held to be voidable only, and that he could not avoid it until he arrived at full age. Although the case of *Zouch v. Parsons* has been questioned in England, it was approved by this court in *Conroe v. Birdsall*, 1 Johns. Cas. 127 [1 Am. Dec. 105]. It was decided in this case, that the bond of an infant was not void, but was voidable only. A different rule was laid down by Lord Coke, who says that an infant will not be bound by a penal obligation, even where it is given for necessities: Co. Lit. 172 a. See, also, 4 T. R. 363,¹ and *Baylis v. Dineley*, 3 Mau. & Sel. 477.

In *Swasey v. Vanderheyden*, 10 Johns. 33, it was held that the negotiable note of an infant given for necessities, and where that fact appeared upon the face of the instrument, was void. Whether this case and that of *Conroe v. Birdsall* stand well together, need not now be considered. In relation to personal chattels, the rule seems to be, that if an infant give or sell his

1. *Candell v. Shaw*.

goods and deliver them with his own hand, the act is voidable only; but if he give or sell goods, and the donee or vendee take them by force of the gift or sale, the act is void, and the infant may bring trespass: 1 Mod. 137;¹ Bac. Abr., Infancy and Age, 1, pl. 3. This distinction was recognized in *Roof v. Stafford*, 7 Cow. 179. The infant brought trover for a horse which he had sold to the defendant, and the court held that the sale was not absolutely void, on the ground that he had made manual delivery of the goods; and being voidable only, that he could not avoid the sale until he came of age. This judgment was reversed in the court for the correction of errors, 9 Cow. 626,² on the ground that it did not appear in point of fact that there had been a manual delivery of the horse. Chancellor Jones, who delivered the opinion of the court, said: "The fact of possession by the vendee, would be evidence of a delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of personal delivery. An infant can not make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious, and in itself a conversion."

In the case under consideration, the plaintiff did not deliver the property, and the sale by the father was wholly without authority. The infant could not make an attorney or agent to do such an act. The purchaser acquired no title, and the plaintiff may at any time treat him as a tort-feasor, and recover the value of the property. The ground on which the court below placed the cause, in their charge to the jury, is wholly untenable; and it is therefore unnecessary to inquire whether there be any other ground on which the plaintiff can succeed as to the cow (and its offspring) purchased of Easterbrooks. The plaintiff has never ratified the sale made by her father, nor can that be done while she remains an infant. The court below placed her title upon the ground that the father, with her consent and as her agent, had made an exchange of one animal for another, and that this was a lawful act. But her consent conferred no authority, and the father could not act as her agent. She has her remedy for the unauthorized sale; and that transaction can have no legal connection with

1. *Manby v. Scott*.2. *Stafford v. Roof*.

the subsequent purchase of two cows from Easterbrooks. If she acquired any right to one of those animals, it must be on the ground either of a gift or a sale to her by the father; and before she can recover, the validity of that act must be passed upon by a jury. But she can never recover this animal without making a profit by her incapacity to contract. She has an undoubted right of action for the cow given to her by Gross, and if she may also recover the one given in exchange by her father, she may have double satisfaction, when, in law, there has been but one injury. It is, however, enough for the present, that the court below erred in its charge to the jury.

Judgment reversed.

CONTRACTS OF INFANTS, WHEN VOID, VOIDABLE, OR BINDING: *Oliver v. Houdlet*, 7 Am. Dec. 134 and note; *Whitney v. Dutch*, Id. 229 and note; *Philip v. Green*, 13 Id. 124; *Willard v. Stone*, 17 Id. 496; *Campbell v. Stakes*, 19 Id. 561; *Fridge v. State*, 20 Id. 463; *Lawson v. Lovejoy*, 23 Id. 526; *Delane v. Blake*, 25 Id. 617; *Wheaton v. East*, 26 Id. 251 and note; and *Medbury v. Watrous*, 7 Hill, 112; *Bartholomew v. Finmore*, 17 Barb. 430; *Ely v. Ehle*, 3 N. Y. 508. In the last two cases the distinction is adverted to in the gifts or sales of infants between the actual, manual delivery of the goods by the infant, and instances where such delivery is wanting.

FATHER MAY BE A GUARDIAN IN SOCAGE under the revised statutes: *Porter v. Bleiler*, 17 Barb. 152, citing the principal case.

CONSTRUCTIVE TRESPASS arises where there is a mere claim of dominion with an intention being indicated to interfere with the goods under pretense of right or authority: *Connah v. Hale*, 23 Wend. 467; *Greene v. Burke*, Id. 495; *Latimer v. Wheeler*, 1 Keyes, 475. And in case of wrongful seizure by a sheriff, those who directed it are liable as original trespassers: *Loomis v. Cline*, 4 Barb. 455; *Latimer v. Wheeler*, 1 Keyes, 475, all citing the principal case. On the authority of *Fonda v. Van Horne*, and other decisions, it is stated in *Brockway v. Burnap*, 16 Barb. 313, that wherever trespass would lie, the injured party might bring replevin.

CHURCH v. GILMAN.

[15 WENDELL, 656.]

DELIVERY IS ESSENTIAL TO THE VALIDITY OF A DEED; it may be made to the grantee himself or any person authorized to receive it.

ACCEPTANCE OF DEED ABSOLUTE will be presumed where it is beneficial to the grantee.

WHERE A DEED IS DELIVERED BY AN AGENT it should be pleaded as the deed of the principal, not that it was delivered as the deed of the agent.

FACTS SHOULD BE PLEADED, not the evidence to sustain them.

TO A REPLICATION on an action for the breach of the covenant of seisin, denying the defendant's plea that the deed under which he claims was executed before the ensembling and delivery of plaintiff's deed, a rejoinder is

insufficient that it was executed before the commencement of the suit with a *idelicet* setting out a date prior to the execution of the plaintiff's deed.

- **ACTION** for the breach of a covenant of seisin. The case appears from the opinion.

M. Taggart, for the plaintiff.

E. D. Smith, *contra*.

By Court, SAVAGE, C. J. The pleadings all concede, what could not be denied, that delivery is essential to the validity of a deed. The questions are, what facts are necessary to constitute a delivery. As was said by the court in *Jackson v. Richards*, 6 Cow. 617, 618, it essential to the validity of a deed, that it should be delivered by the grantor and accepted by the grantee. A deed takes effect only from its delivery; and there can be no delivery without acceptance, either express or implied. They are necessarily simultaneous and correlative acts: See also 2 Wend. 317.¹ The pleas do not state the delivery. In the case cited, it was said that in pleading it was not necessary in terms to aver either the sealing or delivery of a deed: they are both implied in the term deed or writing obligatory; but this is merely a rule of pleading, and does not decide what facts shall be evidence of sealing or delivery. The fact of delivery may be controverted by evidence, and also by pleading. Hence the plaintiff, in answer to all three of the pleas now under consideration, simply denies the delivery; and to this denial, the defendant has rejoined in three different modes. The questions are distinct under each plea; and for the purpose of considering them separately, I will state them distinctly. The fourth plea avers title in the state of Connecticut, on the tenth of April, 1835; and that on that day, the state, by its authorized agent, Isaac Spencer, did grant, sell, bargain, and confirm the premises to the defendant, his heirs and assigns. Upon the replication interposing the fact of non-delivery, the rejoinder states the facts at large, to wit, that on the third October, 1834, the defendant was entitled to a deed, having fully paid the consideration; that he employed Levi Ward, of Rochester, to procure the deed from the state of Connecticut; that Ward prepared the deed and sent it to the agent of the state to be executed; that the agent signed, sealed, and acknowledged the deed, and delivered it to Seth P. Beers, as his (said Spencer's) deed, to be transmitted to Ward for the de-

1. *Jackson v. Perkins*.

fendant. The fifth plea and replication are substantially like the fourth. The rejoinder, however, is different: it states, like the preceding, that the deed was signed, sealed, and acknowledged by the agent of the state, and was delivered to Beers as the deed of the state of Connecticut to the defendant, and that on the fifteenth April, 1835, it was directed at Hartford by Beers to Ward at Rochester, for personal delivery to the defendant. The seventh plea states that the defendant was entitled to a deed from the state of Connecticut; that the state, by Spencer, who is fully authorized, did by deed give, grant, etc., the premises to the defendant; and as to the delivery, the rejoinder avers that before the commencement of the suit, to wit, on the twentieth day of May, 1835, the deed was delivered to the defendant. There are therefore three distinct questions presented, but all upon the point of delivery: 1. Whether a delivery of the deed to a stranger, as the deed of the agent, is a valid delivery; 2. Whether a like delivery of the deed to a stranger, by the agent, as the deed of the principal, is a valid delivery; 3. Whether a deed dated the tenth April, 1835, and delivered to the defendant on the twentieth May, 1835, two days before the defendant conveyed to the plaintiff, justified such conveyance. This is the question upon the record; but it has been argued by counsel as if the delivery to the defendant was subsequent to the conveyance by the defendant to the plaintiff, but before the commencement of this suit. The delivery may be made to a stranger. The Touchstone is referred to as authority by most of the cases to be found on this subject. It is there said, 1 Touch. 57, 58, that delivery is essential to the validity of a deed; that the delivery may be made by the party himself, or any other by his appointment. So the delivery may be made to the party himself to whom it is made, or to any other authorized to receive it; "or it may be delivered to any stranger, for and in the behalf, and to the use of him to whom it is made, without authority; but if it be delivered to a stranger without any such declaration, intention, or intimation, unless it be in case where it is delivered as an escrow, it seems there is not a sufficient delivery."

In *Jackson v. Phipps*, 12 Johns. 421, Mr. Justice Spencer quotes the above doctrine from the Touchstone with approbation. He reiterates the point decided in *Jackson v. Dunlap*, 1 Johns. Cas. 114 [1 Am. Dec. 100], that it is essential to a deed that a grantee assent to receive it; that there can be no delivery without acceptance, and that it would be

absurd to hold that a thing was delivered where there was no person to receive. In that case the deed had been executed and acknowledged, and left in the clerk's office for recording; but neither the grantee, nor any person on his behalf, was present to receive it, and therefore it was held to be inoperative. In the case of *Verplank v. Sterry*, 12 Johns. 550 [7 Am. Dec. 348], the same point was presented and discussed by the same learned judge. The facts were however different: a trust deed, by way of a family settlement, had been delivered to the *cestui que trust*, and by her afterwards returned to the grantor for safe keeping, and while the deed was so in his possession, he conveyed the same premises to a *bona fide* purchaser. The subject of the delivery necessary to consummate a deed was again discussed, and it was remarked that a deed is available if delivered to the party grantee, or even to a stranger without special authority, if intended for the use of the grantee. The point became important in that case, as the delivery to the *cestui que trust* was unconditional, and a subsequent delivery to the trustee was conditional; which condition the learned judge held to be inoperative and void, because the deed had become effectual by the first delivery. This delivery was not strictly to a stranger, but to a person not a party, nor taking any legal estate under the deed.

In *Jackson v. Bodle*, 20 Johns. 187, the same point of the necessity of acceptance was presented to the court, and Spencer, C. J., says: "It is necessary to the validity of a deed, that there be a grantee willing to accept it. It is a contract, a parting with the property by the grantor, and an acceptance thereof by the grantee. An acceptance will be presumed from the beneficial nature of the transaction, where the grant is not absolute. The presumption is not so strong that the grantee accepts the deed, where he derives no benefit under it, but is subjected to a duty or the performance of a trust." If an acceptance will be presumed, where the deed is not absolute, because the transaction is not beneficial to the grantee, surely such presumption will prevail where the deed is absolute, and on its face beneficial to the grantee. Much more will an acceptance be presumed, where it appears by proper averments, that the grantee was entitled to the deed, having paid the consideration: where the deed had been prepared and forwarded for execution by the grantee or his attorney, and had been executed upon his solicitation. Although, therefore, there is no case in this court where the facts called for the decision of the

precise point, that a delivery to a stranger for the use of the grantee is a good delivery, yet the doctrine of the Touchstone has been quoted to that effect with approbation, whenever the subject of delivery has been before the court.

In Connecticut the very point has been decided in *Belden v. Carter*, 4 Day, 66 [4 Am. Dec. 185]. The action was ejectment by the plaintiffs, as heirs at law of Hogaboom. The defendants claimed by deed from Hogaboom to defendant's wife when sole. After the grantor had signed and acknowledged the deed, he addressed E. Wright, esq., and said: "Take these deeds and keep them; if I never call for them, deliver over one to Pamela (defendant's wife) and the other to Noble, after my death. If I call for them, deliver them up to me." W. received the deeds, H. never called for them; after his death they were delivered according to his directions. Pamela was not present, and never conversed with W. on the subject. These deeds were executed at the same time when H. made his will. The court said, the reservation to countermand made no difference; it was in the nature of a testamentary disposition of real estate, and was revocable without an express reservation. The case therefore stood as if there had been no reservation. "It was a delivery of a writing as a deed, to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is, that it became the deed of the grantor presently; that Wright held it as trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor, and that the deed took effect, by relation, from the time of the first delivery." The case of *Wheelwright v. Wheelwright*, 2 Mass. 447 [3 Am. Dec. 66], was one which called for the decision of the same point. That was an action in partition, in which the petitioners claimed by deeds from Samuel Wheelwright, from whom also the defendants claimed, under his will. There Joseph, one of the petitioners, requested the witness to draw the deeds; Samuel called upon witness and executed them, and delivered them for the use of the grantees, to be delivered after the death of the grantor. Chief Justice Parsons, in discussing this point, says: "If a grantor deliver any writing, as his deed, to a third person, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is trustee of it for the grantee. The fact that the deed in this case

was delivered to Mr. Beers, to be forwarded immediately to the grantee, makes this case stronger than where the deed was to be delivered over upon some future event." The case of *Hatch v. Hatch*, 9 Mass. 307 [6 Am. Dec. 67], was very similar to *Wheelwright v. Wheelwright*, except that in this case the petitioners were heirs at law, and the defendants claimed under deeds executed about four years before the death of the grantor, in the absence of the grantees, and delivered by the grantor to J. Turner, esq., to be delivered to the grantees if they survived him. Sewall, J., adopts the previous case as settling the law. These cases are cited and approved by this court, in *Ruggles v. Lawson*, 13 Johns. 285 [7 Am. Dec. 375], which was somewhat similar, and the court say the deed takes effect from the first delivery. The case of *Maynard v. Maynard*, 10 Mass. 456 [8 Am. Dec. 146], shows the necessity of an absolute delivery to give validity to a deed executed under such circumstances. In this case the deed was executed with the usual formalities, and recorded, and the grantor requested the witness to keep the deed until it was called for. The grantee knew nothing about these transactions. After the death of the grantee, the grantor called for the deed, took and canceled it. The court said it was clear that there was no delivery of the deed so as to pass the estate; it was the intention of the grantor to keep control over the deed until fully determined whether ultimately to pass the estate to the grantee. The court say the title never passed. The only reason why it did not pass was, that the deed was not delivered as the deed of the grantor, for the use of the grantee.

These cases are full to the point; they were in the nature of testamentary dispositions, but not, on that account, to be the less regarded as authority. If deeds thus delivered are valid against the heir or devisee, they are surely good against the grantor who has received a valuable consideration. The question in both cases is, whether the grantor has divested himself of the estate; if he has, that estate vests in the grantee; and whether he has so divested himself or not, depends on the delivery. If the delivery is absolutely as his, the grantor's, deed, to the stranger for the use of the grantee, the delivery is good; but if it be delivered to the stranger subject to the future control of the grantor, no estate passes. Where the delivery is absolute, the assent of the grantee is presumed from the fact that the conveyance is beneficial to him. In this case it is not necessary to presume assent, for it is alleged that the deed was drawn by the defendant's agent, and executed at his sollicita-

tion. It appears to me, therefore, that the delivery of the deed of the state of Connecticut to Mr. Beers, as the deed of the state for the use of the grantee, the defendant, was a good and valid delivery. It is very well settled, however, that an attorney must execute a deed in the name of his principal. The act must be the act and deed of the principal, though done by the attorney. So the delivery must be as and for the deed of the principal, not of the attorney. The rejoinder to the replication to the fourth plea is in that respect bad. The reasons and authorities referred to under the first question show that although the delivery of the deed, as the deed of Spencer, was bad; yet its delivery as the deed of the state of Connecticut, for the use of the defendant, the grantee, was a valid and effectual delivery. The deed became the deed of the state presently; and the title vested in the grantee as of the day of such delivery. Of course the defendant was seised on the twenty-second May, when he conveyed to the plaintiff. It follows that the rejoinder to the replication to the fifth plea is good; and for the same reasons, and indeed, independent of these considerations, that the rejoinder to the replication to the seventh plea is good in substance, provided the facts are well pleaded.

The replication denies the delivery; the rejoinder affirms it to have been made to the defendant before the commencement of the suit, to wit, on the twentieth May, 1835, which was in fact two days before the conveyance of the defendant to the plaintiff. Had the averment been that it was delivered before the execution of the deed to the plaintiff, it would have been perfect; but as pleaded with a *videlicet*, the defendant would not be bound to prove the delivery on the twentieth May, 1835. Showing the delivery any day before the commencement of the suit would be sufficient to sustain it. A question, however, still arises, whether the delivery of the deed to the defendant at any time before the commencement of this suit is not a bar to the action. I think it is; but a majority of the court think otherwise; my brethren are of opinion that the covenant of seisin being broken at the moment it was executed, the plaintiff is entitled to recover damages for the breach, although such damages may be merely nominal. My opinion is that the plaintiff's title being perfect before he commenced his suit, he had no cause of action, although such cause might have existed before the delivery of the deed from the state of Connecticut to the defendant. Having thus examined these pleadings upon the merits, and ascertained that the right of

the case is with the defendant, it is not without regret and reluctance, that it becomes necessary to decide the whole of the demurrers against the defendant, upon a point of form. The rejoinders are all argumentative. The defendant has pleaded the evidence of the fact of delivery, instead of the fact itself, and for that cause the rejoinders are bad. The result is, that the rejoinders are bad in form, for the cause last mentioned; that the rejoinders to the replications to the fourth and seventh pleas are also bad in substance; but the rejoinder to the replication to the fifth plea is good in substance, though bad in form. There must be judgment for the plaintiff on all the demurrers, with leave to the defendant to amend, on payment of costs.

Judgment accordingly.

DELIVERY IS ESSENTIAL TO THE VALIDITY OF A DEED: *Chess v. Chess*, 21 Am. Dec. 350; *Buffum v. Green*, 20 Id. 562; *Jones v. Jones*, 16 Id. 39, note; *Barns v. Hatch*, 14 Id. 369 and note; *Chadwick v. Webber*, Id. 222; although in Maryland the statute makes a deed take effect from its date: *Betts v. Union Bank*, 18 Id. 283. It is not necessary that the delivery should be made to the grantee; if made to a third person for the grantee's use, it is sufficient: *Jones v. Jones*, 16 Id. 39 and the note thereto; *Duncan v. Hodge*, 17 Id. 734; *Buffum v. Green*, 20 Id. 562; *Jackson v. Rowland*, 22 Id. 557 and note; and *Rose v. Baker*, 13 Barb. 233; *Moir v. Brown*, 14 Id. 44; *Fisher v. Hall*, 41 N. Y. 423; *Berly v. Taylor*, 5 Hill, 586, each citing the principal case. Whether or not in case of a delivery to a third person, the deed is to take effect presently or as an escrow merely, depends upon the intent: *Jackson v. Rowland*, 22 Am. Dec. 557; *Jones v. Jones*, 16 Id. 39 and note; *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66; *Barns v. Hatch*, 14 Id. 371.

THE SUBJECT OF DELIVERY OF DEEDS IS CONSIDERED AT LENGTH in the note to *Jones v. Jones*, 16 Id. 39.

The principal case is cited, to show the necessity of the acceptance of a deed, in *Stephens v. N. Y. and Buffalo R. R. Co.*, 20 Barb. 338; and in regard to the question of pleading, that facts themselves, and not the evidence of them, should be pleaded, in *Fidler v. Delavan*, 20 Wend. 60; *Pattison v. Adams*, 7 Hill, 127; *Boyce v. Brown*, 7 Barb. 85.

CASES
IN THE
COURT OF ERRORS
OF
NEW YORK.

ÆTNA FIRE INSURANCE CO. v. TYLER.

[16 WENDELL, 325.]

DESCRIPTION OF A HOUSE AS "MY HOUSE," in an application for insurance, is not erroneous so as to vitiate the policy, where the applicant is in possession under a valid contract to purchase and has paid part of the consideration, but has received no conveyance.

PURCHASER IN POSSESSION IN SUCH A CASE HAS AN INSURABLE INTEREST to the full value of the house, and may recover such value within the amount insured, upon a total loss, notwithstanding a previous policy taken out by his vendor upon the same property.

TO CONSTITUTE DOUBLE INSURANCE, both policies must be upon the same insurable interest, either in the name of the owner thereof, or of some one for his benefit.

POLICY OF FIRE INSURANCE IS A PERSONAL CONTRACT with the assured, and does not pass to a purchaser of the property unless assigned with the assent of the insurer.

POLICY ISSUED TO A VENDOR OF PROPERTY BEFORE THE SALE, and not assigned to the purchaser, protects his insurable interest to the extent of the unpaid purchase money, but does not affect the purchaser's liability for such unpaid balance.

INSURANCE SO EFFECTED BY THE VENDOR IS NOT A "PREVIOUS" or "other insurance" within the meaning of conditions in a subsequent policy to the vendee, that it shall be forfeited by a failure to notify the company of any "previous insurances," and that in case of "any other insurance" upon the property, the respective insurers are to contribute ratably in case of a loss, where such prior policy is not assigned to the purchaser.

FORMAL DEFECTS IN PRELIMINARY PROOFS of a loss on a policy, which might have been obviated if objected to in season, will be deemed waived if the insurers do not object to paying the loss on that ground, but on another distinct ground.

MAGISTRATE'S CERTIFICATE OF A LOSS required by a policy need not be in the precise words of the policy.

CERTIFICATE STATING THAT THE MAGISTRATE IS "ACQUAINTED" with the assured and resides within two miles of him, is sufficient to comply with a requirement in the policy that the magistrate shall state that he is "acquainted with the character and circumstances" of the assured.

STATEMENT OF LOSS IN THE CERTIFICATE to the effect that the magistrate is satisfied that the assured has "sustained damage or loss by said fire to the amount of the buildings" mentioned in the assured's affidavit of loss, is sufficient to fulfill the requirement that the amount of the loss shall be stated. Walworth, Chancellor, *contra*.

ERROR from the supreme court in an action on a policy of insurance. The property insured was described in the application as "my house in which I reside," and in the policy as "his two-story frame dwelling-house." A condition in the policy required that the assured, in case of a loss, should forthwith give notice, accompanied by a certificate of a magistrate, notary, or clergyman, that he was "acquainted with the character and circumstances" of the assured, and that having investigated the circumstances of the loss, he knew or verily believed that the assured, "by misfortune, and without fraud or evil practice," had sustained "by such fire loss and damage to the amount therein mentioned." The policy further provided that if "the insured shall have already any other insurance against loss by fire on the property hereby insured," and not notified to the company, the insurance should be void; so in case of any subsequent insurance by "the insured or his assigns," of which notice should not be given with reasonable diligence, and that "in case of any other insurance" on the property, "whether prior or subsequent" to the policy, the insured should recover from the company only a ratable proportion of the whole insurance upon the property. Another condition annexed to the policy was, that "notice of all previous insurances" should be given and indorsed on the policy, or acknowledged in writing by the company, or the policy should be void, and also that any fraud or false swearing should forfeit the policy. The house having been destroyed by fire, the plaintiff submitted to the company an account of the loss verified by his oath, describing the property destroyed, and stating its value, and the amount of his loss, and that the property "was not insured by any other person or persons, nor by him at any other office." Accompanying this statement was a certificate of one Groves, a justice of the peace, to the effect that he resided "within two miles of the place mentioned in the policy above described;" that he was "acquainted with Whitman M. Tyler in the said policy mentioned." and con-

cluding as follows: "And that I have this twenty-second day of April, instant, examined the circumstances attending the fire in said Tyler's certificate mentioned; and I do further certify that I am satisfied and do verily believe, that the said Tyler has, by misfortune, and without fraud or evil practice, sustained damage or loss by said fire to the amount of the buildings therein mentioned." This certificate and the plaintiff's account of loss above mentioned were offered in evidence as preliminary proofs of loss, and were received against the defendant's objection that the certificate did not comply with the requirements of the policy. The defendants, after the plaintiff had rested, were permitted, against the plaintiff's objection, to introduce in evidence, for the purpose of showing that the plaintiff did not own the property and had fraudulently concealed the nature of his interest, a contract dated July 2, 1827, between the plaintiff and one Shafer, whereby Shafer bargained and sold the said property to the plaintiff for a certain consideration which the plaintiff covenanted to pay, partly in cash installments, and partly by assigning to Shafer a contract for the purchase of a certain tract of land. It appeared by the indorsements, that part of the consideration had been paid and part remained unpaid. Evidence was admitted also to show an overvaluation of the property in the said contract for the purpose of defrauding the defendants, and evidence to rebut the same was also admitted. The defendants were also allowed to prove, against the plaintiff's objection, that Shafer, on June 30, 1825, had insured the same property in the "Merchants' Insurance Company," which insurance had been renewed from time to time and was in force at the time of the loss, and that the plaintiff knew of the existence of this policy when he contracted with the defendants. The judge charged the jury in substance that there was no such misdescription of the property as to avoid the policy; that the plaintiff was not bound to give the defendants notice of Shafer's policy, and that his knowledge of the existence of such policy, and his neglect to disclose it, no fraud being alleged as to that matter, should not influence the verdict; and that if the plaintiff was entitled to anything, he was entitled to recover the actual value of the property to the extent of the insurance, with interest, without regard to the fact that part of the purchase money had not been paid, and without regard to Shafer's policy. The questions of fraud in obtaining the policy and of false swearing in the account of loss were left to the jury. Verdict for the plaintiff for the

sum insured, with interest. Motion for a new trial by the defendants on exceptions to the admission of evidence objected to by them on the trial, and to the instructions of the judge. The motion having been overruled by the supreme court (see 12 Wend. 507), the plaintiff had judgment and the defendants brought the case here on writ of error. The points relied on sufficiently appear from the opinion of the chancellor.

I. L. Wendell and S. Stevens, for the plaintiffs in error.

M. T. Reynolds and S. Beardsley, attorney-general, for the defendant in error.

WALWORTH, Chancellor. There is no misdescription in this case of the subject of insurance in the policy. Neither was there any misrepresentation or concealment of any fact on the part of the assured, which was at all material to the risk, in the application for the insurance; and the jury have negatived all pretense of fraud on the part of Tyler, in not disclosing the true state of his title. It is a fact of public notoriety that a great portion of the property in the eighth senate district, and much in every other part of the state, is held by those who are considered the real owners thereof for most purposes, under contracts, without having paid the whole purchase money, and obtained legal conveyances; and this court certainly can not presume that the officers of this or any other insurance company in the state are ignorant of this fact, or that they considered the fact as in any way material to the risk. If they considered it material that the state of the legal title should be disclosed, they would, in their notices to the public, specifying the information required from country applicants, have inserted this as a necessary part of that information. Yet this is not required in any conditions which I have seen except in the case of mutual insurance companies, where the true state of the title is material to enable the officers of the company to judge of the security which the insured premises will afford for the payment of the premium note, if an assessment should become necessary. It is also a fact of public notoriety, that in common parlance the person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof, whether he has paid the whole of the purchase money, and gotten the legal title or not, is called the owner thereof, and the property is usually called his by others. In equity it is, in fact, his; and the vendor has only a lien thereon for the security of his unpaid purchase money; and I am yet to learn

that the person who is in the actual possession of property as the real owner thereof in equity, and who must sustain the whole loss thereof primarily in case of its destruction by the perils insured against, can not insure it as owner, unless there is something in the terms of the policy, or in the conditions referred to therein, requiring the true state of the legal title to be disclosed: See 10 Pick. 40,¹ 542.²

The assured in this case had also an insurable interest to the full value of the dwelling-house described in the policy; and the liability of the underwriters to him was neither diminished nor impaired by the previous policy which the person from whom he purchased had obtained from another company. To constitute a double insurance, both policies must be upon the same insurable interest, either in the name of the owner of that interest, or in the name of some other person for his benefit. In this case Tyler could not claim any benefit under the policy of Shafer, as it had not been assigned to him with the assent of the underwriters therein at the time of the loss. It could not, therefore, in any event, protect him against any portion of the loss he might sustain by the destruction of the house insured, or prevent his liability for the payment of the whole of the purchase money due on his contract. Policies against fire are personal contracts with the assured; and they do not pass to an assignee or purchaser of the property insured without the consent of the underwriters: *Lynch v. Dayrell*, 3 Bro. P. C. 497;³ *The Sadlers' Company v. Badcock*, 2 Atk. 554. If the assured, therefore, sells the property, and parts with all his interest therein before the loss happens, there is an end of the policy, unless it is assigned to the purchaser with the assent of the company; or if he retains but a partial interest in the property, it will only protect such insurable interest as he had in the property at the time of the loss. In the present case all the insurable interest which Shafer had in the property after his sale to Tyler, was the amount of his unpaid purchase money, so far as the land upon which the house stood was insufficient to protect him from loss; and provided the purchaser was unable to pay the same. Even a recovery by Shafer from the other company, would not protect Tyler from any part of the loss sustained by the destruction of the building, as he would still be liable for the whole amount of the purchase money. Shafer, indeed, could not recover that money and retain it for

1. *Strong v. Manufacturers' Ins. Co.*; 8 C., 20 Am. Dec. 507.

2. *Curry v. Com. Ins. Co.*; 8 C., 20 Am. Dec. 547.

3. *Lynch v. Dalsell*, 4 Bro. P. C. 431.

his own benefit, after he had been paid by his underwriters; but it could be collected in his name for the benefit of such underwriters, as they are in equity entitled to all his rights and remedies if they pay the amount of his loss.

This principle of equitable subrogation or substitution of the underwriters in the place of the assured, is recognized by every writer on the subject of insurance, and is constantly acted upon in courts of law as well as in equity; so that where the assured has any claim to indemnity for his loss against a third person who is primarily liable for the same, if the assured discharges such third person from his liability before the payment of the loss by the underwriters, he discharges his claim against them for such loss *pro tanto*. Or if he obtains payment from such third person afterwards, it is in the nature of salvage, which he holds as trustee for the underwriters who had paid his loss. Thus, in the case of *Gracie v. The New York Insurance Company*, 8 Johns. 246, where the assured recovered to the full amount of the policy upon a condemnation of the vessel and cargo under the Berlin and Milan decrees, although there was no abandonment of the *spes recuperandi* against the French government, Chief Justice Kent says that if France should at any time hereafter make compensation for the capture and condemnation, the United States upon the receipt of the money, would hold it as trustee for the party having the equitable interest therein; and that would clearly be the underwriter. So in the case of *Godsall v. Boldero*, 9 East, 72, which was the case of an insurance by a creditor upon the life of Mr. Pitt, the British minister, who died insolvent, and the government afterwards granted a sum of money to the executors to pay the debts, the court of king's bench held that the underwriters were entitled to the benefit of the payment made to the creditor by the executors, although there was an actual total loss before the grant by the government to pay the late premier's debts. So in the case of *Mason v. Sainsbury*, referred to as a manuscript case by Marshall in his treatise on insurance, 2 Condry Marsh. 794, and which is recognized as good law in the recent case of *Clark v. The Inhabitants of Blything*,¹ in the court of king's bench, the assured, who had received his whole demand from the underwriters for the loss sustained by a fire, was permitted to recover the same from the inhabitants of the hundred who were also liable to him upon the statute; or rather the underwriters were permitted to re-

1. 2 Barn. & Cress. 254.

cover the same in his name, the suit being prosecuted for their benefit.

The same principle as to the equitable right of the insurer to be subrogated to all the rights and remedies of the assured to obtain compensation for his loss from other persons, was acted upon by the vice-chancellor of the first circuit, in the recent case of *The Atlantic Insurance Company v. Storrow et al.*, where an attempt was made by the master and owners of the vessel, who were primarily liable for a loss of goods by thieves, to throw the loss upon the underwriters, and to deprive them of their remedy over against those who were liable to the assured to make good his loss; and the decision of the vice-chancellor in that case was affirmed upon appeal: See 5 Paige, 285. The rule on this subject is thus correctly laid down by Phillips in his valuable treatise on the law of insurance, which has become a text-book in the American courts: "Where the insurable interest consists of a debt due to the assured, as in the case of advances made by a consignee, or a policy on the life of the debtor, the assured is bound, no doubt, to assign to the underwriters his debt or his insurable interest, whatever it may be, in case of his being paid a total loss:" 2 Ph. Ins. 282. It is evident, therefore, in the case under consideration, that the two insurances, after the sale and when the last insurance was made, were upon two distinct and separate interests. The subject-matters thereof were different: the one being upon Tyler's debt to Shafer, which might be lost by the destruction of the house if the vendee was unable to pay, and the other upon the actual loss of the house. The loss of the house must fall upon the holder of the last policy, in any event, as the underwriters in the first policy will be entitled to an assignment of Tyler's contract to pay the purchase money, and may collect the full amount thereof from him, if they shall pay to Shafer the full amount of his debt. I am satisfied from this view of the rights of the different parties, that there was no prior insurance, within the meaning of the policy, of which the assured was bound to give notice, or which could be resorted to by him to obtain satisfaction for part of his loss.

The clauses in the policy and in the conditions annexed to the same on the same subject, unquestionably were intended to mean the same thing; and if they differ in any respect, the policy itself must be resorted to to explain the meaning; as it would then be a case which would be specially provided for in the policy, otherwise than in the conditions annexed. The lan-

guage of the policy is sufficiently broad to cover any previous insurance on the property in which Tyler had an interest, or which could protect him as the purchaser of the property, provided the previous policy had been assigned to him at the time of his purchase, with the assent of the other company. The terms of the condition are, "if the assured shall have already any other insurance against loss by fire on the property hereby insured," etc., evidently intending to cover not only insurances made by the assured and in his own name, but any others which he had, either in the name of another or by assignment for his benefit. But no one can suppose for a moment that these underwriters intended to be so unreasonable as to require a person insuring with them, under the penalty of a forfeiture of his policy, to give notice of every insurance which any former owner of the property might have made thereon, although he had no interest in that insurance, and the rights of the company could not in any way be affected thereby; that if there was any such insurance, even in those cases where the fact was notified to the underwriters, the person insured with them should only recover a part of his loss from them, although he had no interest in and could not be benefited by the other insurance. To suppose the underwriters intended that such a construction should be given to this part of the policy, would be to suppose that they intended to entrap those who insured with them.

The plain and obvious meaning of the whole clause is, that if the assured has any other policy or insurance upon the property, by assignment or otherwise, by which the interest intended to be insured is already either wholly or partially protected, he shall disclose that fact and have it indorsed on the policy, or the insurance shall be void; and the same where he shall make any subsequent insurance; also, that in case of any such prior or subsequent insurance, although it is notified to the company and indorsed on the policy, the underwriters in the two policies shall contribute ratably to his loss, so that in no event he can recover more than the amount of his actual loss. I am satisfied, therefore, that the policy was valid; that the assured had an insurable interest to the value of the house which was burned; and as the jury have found that value to be the whole amount underwritten in the policy, he was entitled to recover that amount with the interest thereon after the sixty days, if the condition as to the proof of loss, etc., has been

complied with by him according to the terms of the policy, or has been waived by the underwriters.

The certificate of the magistrate was a part of the preliminary proofs as to the nature, circumstances, and extent of the loss which, by the express terms of the policy, the underwriters had a right to insist upon before any action could be sustained for such loss; but the production of this document, as well as any other part of the preliminary proofs of loss and interest, might be waived by the company. The law is well settled in this state, that if there is a formal defect in the preliminary proofs, required by the policy or the custom of the place, and which could probably have been supplied, had any objection been made by the underwriters to the payment of the loss on that ground, if the insurers do not call for the document, or make an objection on the ground of its absence or imperfection, but put their refusal to pay distinctly on some other ground, the production of such further preliminary proof will be considered as waived: *Vos v. Robinson*, 9 Johns. 192; *Ocean Insurance Company v. Francis*, 1 Wend. 64;¹ *Curry v. Commercial Insurance Co.*, 10 Pick. 536 [20 Am. Dec. 547].

I am aware that the supreme court of the United States thought differently on this question, when the case of the *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, was first before that court, and that it was held that the court below had improperly submitted the question of waiver to the jury upon the facts proved. The subsequent history of that case, however, shows the good sense of the rule as established in our own courts; for it appears that as soon as this decision of the supreme court was known, the assured procured a new certificate from the justice, in which the formal defects in the first were obviated, and which the same court afterwards held to have been procured in time, and to be a compliance with the terms of the contract requiring the certificate, etc., to be produced before the loss should be payable; and that it was procured within a reasonable time, under the circumstances of that case, although more than five years had elapsed after the destruction of the property before such new certificate was procured: See 10 Pet. 507. The only effect of the original decision, therefore, was to turn the assured around to a new action, after such a lapse of time, upon an objection which was not probably thought of by either party at the time when the claim was originally made, and the preliminary proofs exhibited; and which objection might have been immediately

1. 2 Wend. 64; S. C., 19 Am. Dec. 549.

obviated, if it had been suggested by the officers or agents of the company, or if they had thought proper to put their refusal to pay either upon that ground alone, or upon that in connection with others which went to the merits of the claim. Good faith on the part of the underwriters, in such a case, requires that, if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprise the assured that they consider the same defective in that particular, or to put their refusal to pay upon that ground as well as others, so as to give him an opportunity to supply the defect before it should be too late; and if they neglect to do so, their silence should be held a waiver of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy. The difficulty in the present case on this subject, however, is, that the question of waiver was not raised at the circuit, so as to give the underwriters an opportunity of showing that they had in fact, insisted upon the want of a proper certificate as a necessary part of the preliminary proofs; the court having decided that the certificate produced was such a one as the condition of the policy required, which of course precluded all consideration of the question of waiver.

Although the underwriters, if they make the objection in time, have a right to insist upon the production of such a certificate as is specified in the conditions of the policy, and from the proper person, before they shall be liable for the payment of the loss, I do not understand the rule to be so strict as to render it necessary that such certificate should be in the precise words mentioned in the policy, provided it is so drawn as evidently to mean the same thing. Even in the case of a warranty in a policy, although the language of the judges in many cases has been that it must be literally complied with, it has been held that a warranty to sail on a particular day was complied with, although the wind blew so that a sail could not be raised, and the master knew it was impossible to get the vessel to sea on that day, by his merely warping the vessel a little further down the river for the *bona fide* purpose of starting on the voyage insured, and putting the vessel in a better situation to proceed on her voyage to the port of destination as soon as the wind would permit her to go to sea: *Cockrane v. Fisher*, 2 Crompt. & M. 581. This decision was afterwards affirmed upon a writ of error to the exchequer chamber; the court holding that a literal compliance with the warranty to

sail on that day, was not necessary if the vessel was, *bona fide* and in fact, started upon her voyage by warping her down the river upon the day specified in the warranty: 5 Tyrw. 496.¹

If I could be satisfied, therefore, in this case, that the justice meant to certify that he verily believed the assured had sustained damage or loss by the destruction of the dwelling-house, insured to the amount of two thousand five hundred dollars, or any other specific sum, as stated in Tyler's affidavit or certificate, I should have no difficulty in concurring in opinion with the court below that the preliminary proofs were sufficient, and that the judgment should be affirmed. But when I look at the peculiar terms in which the justice's certificate is framed, and then advert to the fact that the whole of the buildings insured, and not insured, together with the land itself, were sold but a few months before for a much less sum, I can not bring my mind to the conclusion that Groves meant to certify that he believed Tyler's loss upon the dwelling-house alone, which was the only property included in the policy, was worth about two thousand five hundred dollars as stated in the affidavit of the latter. The condition of the policy is not that the magistrate shall state that he believes the assured has sustained damage or loss to the amount mentioned in the affidavit of the latter. The meaning unquestionably is that the certificate shall specify the sum which the magistrate believes the assured has sustained by the destruction or partial destruction of the subject insured. If he believed, therefore, that the loss by the burning of the house, exclusive of the furniture, was less than the sum at which the assured had estimated it in his affidavit, it would have been a compliance with the terms of the policy if he had stated what he believed the real amount of that loss to be, although it was not, in his opinion, so great as that at which Tyler himself had stated it. Although the amount therein mentioned, in the conditions annexed to the policy, evidently means the amount mentioned in the certificate of the magistrate, I have no doubt the certificate would be sufficient if the fair construction of it was that he believed he had sustained damage or loss by the destruction of the subject of insurance to the amount specified by the assured in his affidavit annexed, as that in effect would be a specification of the amount in the certificate of the magistrate by reference to the affidavit to which it was annexed. But as I am unable to give such a construction to the language of the certificate in this

case, I am compelled, upon this point alone, to vote for a reversal of the judgment of the court below. If other members of the court, however, are capable of giving to the certificate the meaning which the counsel for the defendant in error insist it ought to bear, there is very little danger that injustice will be done to the underwriters; as the jury have decided that the loss actually sustained by Tyler upon the property insured was equal to the whole amount of the risk assured by these underwriters.

On the question being put, Shall this judgment be reversed? the members of the court voted as follows:

In the affirmative—The CHANCELLOR, and Senators EDWARDS, HUBBARD, and TRACY—4.

In the negative—The president of the senate, and Senators ARMSTRONG, J. BEARDSLEY, L. BEARDSLEY, BECKWITH, GRIFFIN, DOWNING, FOX, GANSEVOORT, HUNTINGTON, H. F. JONES, J. P. JONES, LACY, LAWYER, LOOMIS, LOUNSBERRY, MACK, MAISON, POWERS, WAGER, WILLES—21.

Whereupon the judgment of the supreme court was affirmed.

MISDESCRIPTION OF INSURED PROPERTY, WHAT IS, AND EFFECT OF.—This subject is considered in the note to *Fowler v. Ætna Fire Ins. Co.*, 16 Am. Dec. 462. See also *Jefferson Insurance Co. v. Cotheal*, 22 Id. 567, and *Farmers' Insurance and Loan Co. v. Snyder*, post. Where an applicant for insurance on a house states that it is his property, and does not disclose the fact that it has been mortgaged, and that the equity of redemption has been taken under execution, it does not thereby vitiate the policy when there was no inquiry as to the state of his title: *Strong v. Manufacturers' Ins. Co.*, 20 Id. 507. If the assured have a freehold interest in the land upon which an insured house stands, and has the exclusive occupation and disposal of the house, a representation that the house is his, though not strictly accurate, is not a misrepresentation avoiding the policy, there being no intentional deception or overestimate of the value of the property: *Curry v. Commonwealth Ins. Co.*, Id. 547. To the point that where an applicant for insurance has some interest in the property proposed to be insured, he is not required to state particularly the extent of his interest, the principal case is cited in *White v. Hudson River Ins. Co.*, 7 How. Pr. 350. So that where he describes the property as "his," he is not bound to show that he owns it in fee: *Phelps v. Gebhard Fire Ins. Co.*, 9 Bosw. 409. But in *Adams v. Rockingham Mut. F. Ins. Co.*, 29 Me. 295, the case is referred to as an authority for the position that in mutual insurance companies it is usual to require that the state of the title should be disclosed to enable the officers of the company to judge of the extent of the security for the payment of the premium notes if an assessment should be resorted to.

INSURABLE INTEREST IN PROPERTY: See on this subject the note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 510.

THAT ONE HAVING CONTRACTED TO PURCHASE PROPERTY, and having paid part of the purchase money, has an insurable interest therein to the extent

of its full value, is a point to which *Ætna Fire Ins. Co. v. Tyler* is cited in *Shochoell v. Jefferson Ins. Co.*, 5 Bosw. 261; *Acer v. Merchants' Ins. Co.*, 57 Barb. 82; *Manley v. Insurance Co. of North America*, 1 Lans. 30.

ALIENATION OF PROPERTY AFTER INSURANCE, EFFECT OF.—This subject is discussed in the note to *Lane v. Mutual Fire Ins. Co.*, 28 Am. Dec. 154. The principal case is referred to as authority for the position that a policy of insurance is a personal contract with the assured, and unless assigned with the consent of the insurer, does not pass to a purchaser of the property, in *Wolfe v. Howard Ins. Co.*, 1 Sandf. 128; *Mann v. Herkimer Co. Mut. Ins. Co.*, 4 Hill, 190; *In re Kip*, 4 Edw. Ch. 95; *Wilson v. Hill*, 3 Metc. 69; *White v. Robbins*, 21 Minn. 372. In such a case the insurance remains for the indemnity of the vendor, and for the protection of his interest, to the extent of the unpaid purchase money: *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. 630; *Clinton v. Hope Ins. Co.*, 51 Id. 654; *Manley v. Insurance Co. of North America*, 1 Lans. 30; *Hill v. Cumberland Valley Mutual Protection Co.*, 59 Pa. St. 477. But if the purchase money is fully paid, the policy is at an end: *White v. Robbins*, 21 Minn. 372, all citing the principal case. In *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 356, the decision in *Ætna Fire Ins. Co. v. Tyler* is referred to as being erroneously relied on to authorize the position that the unpaid vendor's interest in the insurance extends only so far as the value of the land, or the personal responsibility of the purchaser fails to protect him; and it is declared that the chancellor's language on that point does not go so far, and that if it does, it is merely dictum, and not authority.

"OTHER INSURANCE," WHAT IS.—To constitute such "other insurance" as an applicant is bound to disclose on pain of forfeiting his policy, the insurance must be on the same insurable interest and must be for the benefit of such applicant. As authority for this doctrine the foregoing decision is referred to in *Rowley v. Empire Ins. Co.*, 3 Keyes, 559; *McMaster v. President etc. of Insurance Co. of North America*, 55 Id. 233; *Pitney v. Glens Falls Ins. Co.*, 61 Barb. 342; *Phillips v. Perry Co. Ins. Co.*, 7 Phila. 674. In *Hough v. President etc. of People's Fire Ins. Co.*, 36 Md. 433, the dictum in the *Ætna Ins. Co. v. Tyler*, to the effect that in case of double policies on the same insurable interest the several insurers are bound to contribute proportionally to payment of a loss, is referred to with approval.

SUBROGATION OF INSURER TO RIGHTS OF ASSURED.—The dictum of Chancellor Walworth in the principal case, to the effect that after payment of a loss by an insurer, he is entitled to be subrogated to the rights of the assured against third persons to reimburse himself for such loss, is approved in a number of decisions: *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 414; *Callahan v. Lithicum*, 43 Md. 110; *Mercantile Mut. Ins. Co. v. Caleb*, 20 N. Y. 176; *Springfield F. & M. Ins. Co. v. Allen*, 43 Id. 393; *McKechnie v. Sterling*, 48 Barb. 335; *Pentz v. Receivers of Ætna Fire Ins. Co.*, 3 Edw. Ch. 344; *Kernochan v. New York Bowery Fire Ins. Co.*, 5 Duer, 6; *Home Ins. Co. v. Western Transportation Co.*, 4 Rob. 269; S. C., 33 How. Pr. 107.

WAIVER OF OBJECTION TO DEFECTS IN PRELIMINARY PROOFS.—That where an insurer fails to object to defects in preliminary proofs of a loss at the time of their presentation, but puts his refusal to pay on other grounds, and such defects could have been remedied if objected to at the proper time, his objection to such defects is to be deemed waived and can not be urged at the trial, is a point to which *Ætna Fire Ins. Co. v. Tyler* is more frequently cited approvingly than to any other: *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 560; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Id. 471; *Winnekeitt Ins. Co. v.*

Schueler, 60 Id. 471; *Byrne v. Rising Sun Ins. Co.*, 20 Ind. 105; *Keenan v. Missouri etc. Ins. Co.*, 12 Iowa, 138; *Works v. Farmers' M. F. Ins. Co.*, 57 Me. 283; *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill, 186; *Heath v. Franklin Ins. Co.*, 1 Cush. 285; *Clark v. New England Mut. Fire Ins. Co.*, 6 Id. 346; *Underhill v. Agawam Mut. Fire Ins. Co.*, Id. 445; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray, 272; *Patrick v. Ins. Co.*, 43 N. H. 623; *Taylor v. Ins. Co.*, 51 Id. 55; *McMasters v. Western Mut. Ins. Co.*, 25 Wend. 382; *O'Neil v. Buffalo Ins. Co.*, 3 N. Y. 128; *Bumstead v. Dividend Mut. Ins. Co.*, 12 Id. 99; *Kimball v. Hamilton Fire Ins. Co.*, 8 Bos. 501; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 589; *Miller v. Lagle etc. Ins. Co.*, 2 E. D. Smith, 286; *Boynton v. Clinton etc. Co.*, 16 Barb. 257; *Post v. Aetna Ins. Co.*, 43 Id. 365; *Owen v. Farmers' etc. Ins. Co.*, 57 Id. 522; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 476; *Home Ins. Co. v. Cohen*, 20 Gratt. 325; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 26; *Warner v. Peoria M. & F. Ins. Co.*, 14 Id. 324; *Cahill v. Andes Ins. Co.*, 5 Biss. 216 in note; *Cashan v. North-western etc. Ins. Co.*, Id. 478 in note.

MCCREA v. PURMORT.

[16 WENDELL, 460.]

SIGNING A CONTRACT TO SELL LAND only by the party to be charged is sufficient to satisfy the statute of frauds.

LEGAL REMEDY DOES NOT BAR EQUITABLE RELIEF, WHEN.—The fact that a party has a remedy at law by an action for money had and received, does not prevent his coming into equity for relief where the money was received by the defendant as trustee for the plaintiff.

ACTION FOR MONEY HAD AND RECEIVED is equitable in its nature.

PAROL EVIDENCE TO EXPLAIN CONSIDERATION CLAUSE.—The clause in a deed acknowledging payment of the consideration is not conclusive but *prima facie* evidence, except for the purpose of giving effect to the operative words in the deed, and parol evidence is admissible to show that such consideration, though expressed to have been paid in money, was paid in a different manner, under a special agreement constituting the grantor a trustee of the consideration.

STATUTE OF FRAUDS FORBIDDING PAROL AGREEMENTS respecting land does not apply to such a case.

STATUTE OF LIMITATIONS APPLIES IN EQUITY *proprio vigore*, and must have the same effect as at law in cases of concurrent jurisdiction.

FRAUD OR MISTAKE PREVENTING AN ASSERTION OF THE CLAIM, within the statutory period, does not defeat the statutory bar.

ADMISSION OF THE DEBT, EXPRESS OR IMPLIED, and made either to the party or to a stranger, avoids the bar of the statute in such a case.

APPEAL from chancery. The facts were: Purmort being in possession of a certain tract of land in 1812, of which he found the title to be in McCrea, entered into a written contract with the latter for its purchase for a certain sum, in consideration of which McCrea, who alone signed and sealed the contract, agreed to release his interest therein. The last installment of

the consideration was payable in May, 1816. Purmort borrowed one thousand dollars from the state in 1813, for which he gave a mortgage on the land, which was foreclosed for non-payment in April, 1818, and the mortgaged premises sold and bought in by the controller in McCrea's name, the controller believing that he had authority from McCrea as his agent to make the purchase. McCrea and Purmort entered into a new arrangement in 1819, to the effect that the former would give the latter a deed with warranty for the land, and that Purmort should pay five thousand one hundred dollars therefor. A conveyance was made accordingly, in which payment of the five thousand one hundred dollars was acknowledged. Purmort gave a bond and mortgage for said sum, which was fully paid in January, 1824. McCrea never paid the sum of the bid made by the controller in his name at the mortgage sale above mentioned, and the state in 1826 brought an action against him and obtained verdict for said sum, but judgment was arrested thereon; and in 1830 the attorney-general of the state, treating the previous foreclosure and sale as utterly void, began a new suit to foreclose Purmort's mortgage to the state, to which Purmort filed an answer confessing all the material allegations. Subsequently in 1831 he filed the present bill against McCrea and the attorney-general, setting out the facts above mentioned, and also that when the new arrangement was entered into between Purmort and McCrea, and Purmort gave his bond and mortgage for the five thousand one hundred dollars, he did so on McCrea's assurance that he had assumed and provided for the payment of what was due on Purmort's mortgage to the state, and that the five thousand one hundred dollars included not only the money agreed to be paid on the original purchase by Purmort from McCrea in 1812, but also the money due on the mortgage to the state. The prayer of the bill was that the suit by the attorney-general be stayed until the coming in of the answers in the present suit, that the two suits be heard together, and for general relief. McCrea demurred to the bill for want of equity, but the demurrer was overruled, and he then filed his answer, denying all equity in the bill, and also pleaded the statute of limitations and the statute of frauds. As a part of the evidence in the cause, certain parol testimony was admitted to show that the consideration of five thousand one hundred dollars in McCrea's conveyance was paid partly in iron, of a certain quality and estimated value; and certain admissions of McCrea within six years, concerning his liability to Purmort as to the money due the

state on Purmort's mortgage. The chancellor having heard both suits, decreed in the foreclosure suit, that the premises be sold, and the amount of the mortgage paid from the proceeds; and in the other suit, that McCrea pay for Purmort, to the attorney-general, within three months, the money due on the mortgage, until which time the first suit should be stayed, and that McCrea pay the costs of both suits: See 5 Paige Ch. 620. McCrea appealed.

L. H. Palmer and S. Stevens, for the appellant.

L. Hoyt and B. F. Buller, United States attorney-general, for the respondent.

COWEN, J. The objection that the agreement of 1812 is void, as being signed by McCrea only, thus wanting mutuality, and that it must therefore go for nothing in the case, is well answered by the learned vice-chancellor of the first circuit, in *Hunter's case*, 1 Edw. Ch. 5. After noticing the objection that the covenant to sell was not mutual, the vendee not being bound to purchase, and that the covenant was "one-sided," he remarks: "The cases of *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, Id. 370 [7 Am. Dec. 484], have been referred to as establishing this point. Chancellor Kent there intimated that such was the rule, but in a subsequent case in the court of errors, *Clason v. Bailey*, 14 Johns. 484, he had occasion to review that opinion, which he found to be erroneous, and admits that the point is too well settled the other way to be questioned." The case cited by the vice-chancellor will be found a most conclusive authority that the party to be charged need alone sign the contract, in order to satisfy the statute of frauds.

It is objected that the complainant had an adequate remedy at law. I need hardly say, that the argument in that form is far from precluding relief by bill in equity. If the complainant had a remedy at law by an action for money had and received, which I think he had, yet equity has a clear concurrent jurisdiction. That is founded on the fact that McCrea took the money as a trustee: 1 Story Eq. 444, 445; Willes, 405.¹ The action for money had and received is in the nature of a bill in equity. There are numerous cases wherein courts of equity and law have proceeded upon the same ground, to administer each its own appropriate form of redress. There can not be a doubt that this is one of those cases. Buller, J., remarks in

1. *Scott v. Surman*.

Straton v. Rastall, 1 T. R. 370,¹ in the king's bench, that "of late years this court has very properly extended the action for money had and received. It is founded on principles of justice, and I do not wish to restrain it in any respect. But it must be remembered that it was extended on the principle of its being like a bill in equity; and therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and that he could recover it in a court of equity."

It was strenuously insisted on the argument, that to allow an inquiry on evidence *aliunde*, into the real consideration of McCrea's deed, would be to contradict the clause stating the actual payment of the consideration in money. It was also urged that to raise and enforce an implied obligation against McCrea would be to enlarge his deed by parol; that the deed conveys the land only, and limits itself to certain express and definite covenants, beyond which the grantor can not be made liable. That the whole of the proofs, therefore, beyond the deed was inadmissible within the rule which forbids the contradicting and explaining of written instruments by oral evidence.

No doubt the indenture should be regarded as equally conclusive upon both parties, though actually signed and sealed by McCrea only. In legal effect it is the deed of both; and if McCrea, the grantor, would be estopped to inquire into the nature of the consideration, Purmort, who has accepted and claims under the deed, ought also to be concluded. The question of construction, started at the bar, would therefore seem fairly to arise; and indeed I should think the turning question in the cause to be, whether either party may not inquire into the consideration with great freedom. The deed states a consideration of five thousand one hundred dollars in hand paid. The chancellor received parol evidence to show that the consideration was not money, but iron of a certain quantity, and estimated at a certain value. There is certainly a conflict of authority upon this point, greater than I supposed at the argument; and I am glad it has been brought before the court of *dernier ressort*. It is one of extensive business application, and touches the common assurances of the country. A point of greater practical importance could hardly arise, for it is presented every day in the transactions of the community, and respects a species of property more valuable and more highly

prized than any other. It has been much litigated, and I was surprised to find it so far open as it appears to be. The English authorities are conflicting.

The King v. The Inhabitants of Scammonden, 3 T. R. 474, decided in 1781, throws the clause completely open. An estate in lands was purchased, and the consideration mentioned in the deeds was twenty-eight pounds. The offer was to show that the consideration was in truth thirty pounds. This was at first denied, on the distinct ground that parol evidence could not be received to contradict the consideration mentioned in the deeds. On a case made, the king's bench, Lord Kenyon, C. J., and Ashurst, J., being present, held directly the contrary. Lord Kenyon said it was clear that the party might prove other considerations than those expressed in the deed. It is true he mistook the case of *Filmer v. Gott*, 7 Bro. P. C. 70; 4 Id. 230, Toml. ed., which he relied upon; but which, as appears by Brown's report, was a case of fraud. Yet such a strong expression from Lord Kenyon shows the sense of Westminster hall as to the effect of this clause at that time. It is certainly impossible to reconcile Lord Kenyon's decision with that of *Rowntree v. Jacob*, 1 Taunt. 141,¹ made twenty years afterwards. That was an action by a sailor to recover his prize money of a Jew, to whom he had assigned it, by a deed expressing a full consideration, "so much in hand paid, at or before the ensealing and delivery hereof;" and a receipt was indorsed as in the case decided by Lord Kenyon and Ashurst. On the trial an offer was made to show, that in truth nothing was paid, but that the sailor had given the assignment to the Jew with a power of attorney, intending that the money should be received to the use of the former. Mansfield, C. J., entertained considerable doubt, but a majority of the court held that the consideration clause was an estoppel; consequently the sailor lost his money. The still earlier cases, *Villers v. Beaumont*, 2 Dy. 146, a; *Mildmay's case*, 1 Rep. 176; *Vernon's case*, 4 Id. 3; and *vide Peacock v. Monk*, 1 Ves. sen. 128; and *Craythorne v. Swinburne*, 14 Ves. 170, proceeded upon verbal distinctions which it can not be of much use to consider; and several of the later cases are of a similar character: *Lompon v. Corke*, 5 Barn. & Ald. 606; *Baker v. Dewey*, 1 Barn. & Cress. 193.² The last English case on the point which I have seen is *Baker v. Dewey*, 1 Barn. & Cress. 704, decided in 1823; and that is opposed strongly enough to all explanation.

1. 2 Taunt. 141.

2. Error.

The conflict is equally striking in our own cases: *Schemerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 304], and *Maigley v. Hauer*, 7 Id. 341, hold that the clause is conclusive, and can not be contradicted or explained. These cases were greatly shaken, not to say entirely overruled, by *Shephard v. Little*, 14 Id. 210, which is an exact authority for the evidence which was received in the court of chancery between the parties before us. The action was for money had and received. The plaintiff owed one Babcock one hundred and eighty dollars, which the defendant paid; and in order to provide for his reimbursement, the plaintiff deeded his land to the defendant, upon his oral promise to sell the premises, and render the balance over the one hundred and eighty dollars to the plaintiff. The deed was under seal, was absolute on its face, and expressed the consideration to be five hundred dollars in hand paid. The defendant having sold for that sum, refused to pay the plaintiff anything; and at the trial, set up the consideration clause as an estoppel. The supreme court held that the clause was not conclusive, and might be contradicted by the parol evidence. Mr. Justice Spencer, who delivered the opinion of the court, likened the clause to the date of a deed, or a receipt, either of which may, according to all the cases, be either explained or contradicted by parol. Then came the case of *Bowen v. Bell*, 20 Id. 338 [11 Am. Dec. 286], which was assumpsit for land sold and conveyed. The plaintiff had sold his land to the defendant, and by the deed acknowledged the receipt of one thousand dollars as the consideration, in the usual words. Nothing was in truth paid; and he was allowed to prove, by parol, that the defendant had agreed to give two hundred and fifty dollars, none of which had been paid. Mr. Justice Woodworth delivered the opinion of the court, and remarked among other things, that the defendant's contract to pay was liable to no objection arising from the statute of frauds. It appears to me that these cases, if they are to be followed, surrender this clause to the utmost latitude of inquiry, whenever that shall become material to a personal action between the parties.

Such, too, I find is the view which generally prevails. "A man is estopped by his deed," says Parker, C. J., in *Wilkinson v. Scott*, 17 Mass. 249, "to deny that he granted, or that he had a good title to the estate conveyed; but he is not bound by the consideration expressed, because that is known to be arbitrary, and is frequently different from the real consideration of the bargain." The case, in respect to which these remarks

were made, was one wherein the grantee had omitted, by fraud or mistake, to pay the full consideration, and the action was brought for the balance: See also *Goodwin v. Gilbert*, 9 Id. 510, 514; *Pomeroy v. Winship*, 12 Id. 514 [7 Am. Dec. 91]; *Webb v. Peele*, 7 Pick. 247 [19 Am. Dec. 284]; and *Bullard v. Briggs*, Id. 533 [19 Am. Dec. 292]. *Morse v. Shattuck*, 4 N. H. 229 [17 Am. Dec. 419], was an action on the covenant of seisin. The consideration expressed in the deed was nine hundred dollars. The question on the amount was allowed to go to the jury on parol evidence, and they found that the consideration paid was only one hundred dollars. The recovery upon the covenant was therefore reduced accordingly. That case was decided mainly on the authority of the supreme court of the state of New York. And see *Scoby v. Blanchard*, 3 Id. 170; and *Pritchard v. Brown*, 4 Id. 397 [17 Am. Dec. 431]. A precisely similar question, on a like covenant, has recently been decided the same way in the state of Connecticut. The consideration was there shown to be two thousand eight hundred dollars instead of one thousand eight hundred dollars, the sum expressed. The point was thoroughly and ably examined, Hosmer, C. J., dissenting: *Belden v. Seymour*, 8 Conn. 304 [21 Am. Dec. 661]. The course of decision in the state of Maine has been much like that in New York. Their earlier cases held the clause to be conclusive: *Steele v. Adams*, 1 Greenl. 1; *Emery v. Chase*, 5 Id. 232; but in May term, 1830, the supreme court yielded to the great force of authority in the neighboring states, and held parol evidence receivable: *Schillinger v. McCann*, 6 Greenl. 364. The course in Maryland was at first that of England. In May, 1796, the general court followed the rule in *Rex v. Scammonden*, saying that both the consideration clause and the receipt for the consideration money indorsed on the deed were evidence of the lowest order. It was but the mere formal part of the deed, and it was every day's practice to give such a receipt when not a shilling had been paid: *O'Neale v. Lodge*, 3 Har. & M. 433 [1 Am. Dec. 377]. In April, 1802, the same court held them to be a complete estoppel: *Dixon v. Swiggell*, 1 Har. & J. 252.

Thus the matter stood till June, 1827, when the question was very fully considered by the court of appeals, on the authority of the New York and other cases, and the clause was thrown open, at least to a qualified extent: *Higdon v. Thomas*, 1 Har. & G. 139, 145. At its May term of that year, the court of chancery had done the same thing: *Lingan v. Henderson*, 1 Bland. Ch. 249. The right to explain or contradict has been

uniformly sustained in the state of Pennsylvania: *Jordan v. Cooper*, 3 Serg. & R. 564; *Hamilton v. McGuire*, Id. 355; *Watson v. Blaine*, 12 Id. 131, 137, 138 [14 Am. Dec. 669]. Also in Kentucky: *Hutchinson's Adm'r and Heirs v. Sinclair*, 7 Mon. 291, 293; *Gully v. Grubbs*, 1 J. J. Marsh. 388, 389, 390. So in South Carolina: *Curry v. Lyles*, 2 Hill, 404. See per Johnson, J., in *Garrett v. Stuart*, 1 McCord, 514. And in Ohio: *Steele v. Worthington*, 2 Ham. 182, 186, 187; *Swisher v. Swisher's Adm'r*, Wright, 755, 756. So in Virginia: *Harvey v. Alexander*, 1 Rand. 219 [10 Am. Dec. 519], and the cases there cited. The only state whose courts appear to have maintained a steady course of decision favorable to the conclusive character of the clause, is North Carolina: *Brocket v. Foscue*, 1 Ruff. 54; S. C., 1 Hawks, 64; *Graves v. Carter*, 2 Id. 576 [11 Am. Dec. 786]; *Spiers v. Clay's Adm'rs*, 4 Id. 22. I have hastily examined the reports of Mr. Devereux, from 1825, when Mr. Hawks stopped reporting, to 1832, and do not find that the question has been reconsidered.

The only embarrassing distinction which appears to attend the American cases, is that suggested by Mr. Justice Spencer, in *Shephard v. Little*. It is, that you can not show a different consideration from that expressed in the deed, though you may show that it is not paid. In *Bowen v. Bell*, it is put that a different species of consideration can not be proved, and that is followed by Mr. Justice Johnson in *Garrett v. Stuart*, 1 McCord, 514. The instance put by him is, that if the consideration expressed should be a good one, as love and affection, you can not prove a valuable one. In several of the other cases which I have cited, the judges recognize a similar distinction; but in one sense or another the cases themselves are a direct departure from it. In the very case of *Shephard v. Little*, instead of money actually paid as expressed in the deed, the party was allowed to show a mere oral promise to pay it. And in *Bowen v. Bell*, the amount was different. Hosmer, C. J., in *Belden v. Seymour*, expresses his surprise at the distinction. "A consideration of two thousand dollars," said he, "is as essentially different from one of a thousand dollars, as wheat is different from specie; for they are of distinct natures, forms, and qualities. The point is intuitively evident." The force of these remarks is the more obvious if we take the analogous case of a receipt, to which the consideration clause was likened in *Shephard v. Little*. The payment in the receipt, though expressed to be in money, may be contradicted or explained in

any way. You may prove the payment to have been in unavailable securities: *Tobey v. Barber*, 5 Johns. 68 [4 Am. Dec. 326]; *Trisler v. Williamson*, 4 Har. & M. 219 [1 Am. Dec. 396]; *Johnson v. Wood*, 9 Johns. 310 [6 Am. Dec. 279]; *Tucker v. Maxwell*, 11 Mass. 143.

The general doctrine as to the entire freedom of explanation and contradiction of receipts was adopted by this court in *Monell v. Lawrence*, 12 Johns. 521; and almost all the American cases have followed *Shepherd v. Little*, in saying that the consideration clause is equally open. Several of these cases were considered in *Morse v. Shattuck*, and Richardson, C. J., sums up their doctrine by saying: "It is perfectly well settled that a consideration expressed in a deed can not be disproved for the purpose of defeating the conveyance, unless it be on the ground of fraud. But for other purposes the acknowledgment of the receipt of money in a deed may be contradicted." The examination was still more critical and extensive in *Belden v. Seymour*, wherein Mr. Justice Daggett, who delivered the opinion of the court, thus concludes: "The principle is everywhere undoubted, that such a clause in a deed has the effect to prevent a resulting trust in the grantor. He is forever estopped to deny the deed for the uses and purposes therein mentioned; and this is its only operation. The clause is merely formal or nominal, and not designed to conclusively fix the amount either paid or to be paid. Suppose a deed were expressed to be in consideration of five dollars; is it to be said that five dollars only was to be paid, and is that sum to be conclusive upon the parties at all events? They are indeed precluded from denying a consideration, but no farther are they precluded." A more practical, though we can not say a more learned view is given by Robertson, C. J., of Kentucky, in *Gully v. Grubbs*. He remarks: "The authorities on this subject in England, as well as in the states of this union, are various and contradictory. But we believe that the consistent doctrine, and that which accords best with analogy and with the practice and understanding of mankind, is that an acknowledgment in a deed, of the receipt of the consideration, is only *prima facie* evidence of payment. The acknowledgment is inserted, more for the purpose of showing the actual amount of consideration than its payment; and it is generally inserted in deeds of conveyance, whether the consideration has been paid, or only agreed to be paid. If the consideration has not been paid, such an acknowledgment in a deed would be intended to mean,

that the specified amount had been assumed by note or otherwise.

An ordinary receipt is not conclusive evidence of the facts attested by it. A separate receipt for the price of land would, it seems to me, be much stronger evidence that the money had been paid, than the customary acknowledgment in the deed of conveyance. At all events it should be as cogent. But it may be contradicted; why may not the other? Attention to the principles on which parol testimony is admissible to explain or avoid the effect or the apparent import of a writing, may reconcile many if not all of the authorities which seem to be in conflict. One of these principles is, that, as in certain classes of cases, the statute of frauds and perjuries requires writing to vest rights, it would be subversive of the policy of the statute to allow parol testimony to change the legal import of the written evidence of a right. Therefore, in all such cases, no inferior grade of testimony shall be admitted to supply or control the intrinsic meaning of the writing.

Another principle, and one more universal than the former in its application, is, that wherever a right is vested or created, or extinguished, by contract or otherwise, and writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal and common-sense construction of the instrument; but that any writing which, neither by contract, the operation of law nor otherwise, vests or passes or extinguishes any right, but is only used as evidence of a fact, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus a will, a deed, or a covenant in writing, so far as they transfer or are intended to be the evidences of rights, can not be contradicted or opposed in their legal construction by facts, *aliunde*. But receipts and other writings which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation, and liable to contradiction by witnesses.

A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no farther. A deed is not conclusive evidence of everything which it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed; nor is its acknowledgment of a particular consideration

an objection to other proof of other and consistent considerations. And by analogy, the acknowledgment in a deed that the consideration had been received, is not conclusive of the fact. This is but a fact. And testing it by the reason of the rule which we have laid down, it may be explained or contradicted. It does not necessarily and undeniably prove the fact. It creates no right; it extinguishes none. A release can not be contradicted or explained by parol, because it extinguishes a pre-existing right; but no receipt can have the effect of destroying, *per se*, any subsisting right—it is only evidence of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt, it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment, but is the extinguisher itself.

The acknowledgment of the payment of the consideration in a deed is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment in the deed is generally merely formal. But if it be inserted for the purpose of attesting the fact of payment (as it seldom if ever is, in this country), it is not better evidence than a sealed receipt on a separate paper would be; and, as we have already said, it seems to us that it would not be as good, for obvious reasons. The practice of inserting such acknowledgments in deeds is very common, whether the consideration had been paid or not. "For and in consideration of — dollars, in hand paid," is a commonplace phrase, which may be found in deeds generally; and it is seldom intended as evidence of payment, or for any other practical purpose, except to show the amount of consideration. To establish the conclusiveness of such loose expressions, therefore, might produce extensive injustice. If a note had been given for the consideration, and afterwards, without payment, a deed be executed for the land, with the commonplace phraseology in relation to the price, would this be conclusive evidence that the note had been paid off and discharged? Surely not: See *Caldwells v. Harlan*, 3 Mon. 349, 350, 351.

So much for the line of adjudication. Looking at the strong and overwhelming balance of authority, as collectible from the decisions of the American courts, the clause in question, even as between the immediate parties, comes down to the rank of *prima facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end, and that

alone, is it conclusive. Such effect, I have no doubt, has long been ascribed to it by conveyancers and dealers in real estate. It is a construction which violates no rule of law, but harmonizes with well-settled principles, and should be steadily maintained and applied whenever the ends of substantial justice may require it. Applying the rule to the case at bar, even McCrea himself would not be estopped, by his hand and seal signed to this receipt of consideration, in an action of covenant against him upon the deed. It is but a common receipt of so much money in payment. *A fortiori* ought not the other party to the deed to be concluded by his mere acceptance? As to this the deed is not the conclusive measure of liability upon the covenants in the deed. A part of the iron was delivered to McCrea, and received by him as cash, or for the purpose of being changed into cash and paid over to the state. In either view it becomes so much money in his hands in trust for that purpose. A violation of that trust entitles Purmort to his bill in equity, or the more technical remedy of an action for money had and received: *Ainslie v. Wilson*, 7 Cow. 662, 667 [17 Am. Dec. 532].

Let us not be told that McCrea has limited his liability even in form to an action upon the covenants in his deed. I agree with him in the argument put forward by his answer that there is no remedy upon those covenants. Purmort's title is sold out upon an incumbrance created by himself coterminously with the deed, for which his grantor can not be made liable on the common covenants. *Volenti non fit injuria*. Nor if there were a remedy could Purmort go into a court of chancery; his remedy was at law exclusively. But the obligation here is entirely collateral; it springs by operation of law from a set of circumstances, connected to be sure with the deed as one of them, and the direction given to a part of the money, which was said to be inaccessible through the solemn forms in which it had been shrouded. The obligation is now seen to be something over and above the covenants. In one case, recently decided, the parties had entered into sealed covenants which implied a consideration, to stand seised of certain lands holden by them in severalty, as trustees for each other in certain proportions; yet oral evidence was received, as between two of the parties to the deed, showing a simultaneous agreement by the defendant, who was one of them, to pay over as a part of the consideration a sum of money due by the plaintiff to a third person: *Davenport v. Mason*, 15 Mass. 90. Mr. Justice Wilde, in delivering the opinion of the court, admitted

the general rule, "that parol evidence is inadmissible to contradict or vary the terms of a deed." But he added, "parol evidence may be admitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed, or rather written contract."

But it is said that the statute of frauds applies, forbidding parol agreements in respect to lands. The contrary proposition was distinctly held in *Bowen v. Bell*, and the same thing is either expressly laid down, or essentially involved in all the decisions of a kindred character.

It is also said the statute of limitation applies, more than six years having elapsed since McCrea's liability accrued; nay, nearly twice that time before the bill was filed. It is indeed true that Purmort's remedy is barred by the statute, if that has not been waived by McCrea. A party can not evade the legal bar to his action for money had and received by changing his forum. The jurisdiction of chancery being concurrent with the courts of law, the statute comes in *proprio vigore*, and must receive the same construction here, and can be answered by no other disabilities than if the remedy had been sought at law: *Roosevelt v. Mark*, 6 Johns. Ch. 266; *Hamilton v. Shepperd*, 8 Murph. 118; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 111-128 [11 Am. Dec. 417]. In *Murray v. Coster*, 20 Johns. 576, 585 [11 Am. Dec. 333], this court held, according to the language of Spencer, C. J., "that where there is a concurrent jurisdiction in the courts of law and of equity, the rule must be the same, and the statute of limitations may be pleaded with the same effect in one court as in the other." Within the rule thus laid down, Purmort can derive no benefit from the allegation of fraud or mistake by which he may have been prevented from asserting his claim within the six years: *Troup v. Smith*, 20 Id. 33. But he seeks to answer McCrea's plea of the statute by proving that he has confessed his liability within six years. This McCrea says can not be done upon the bill filed in the court below. At law it is said that fact must have been replied; and on the theory of chancery pleading, whereby a bill must combine the two characters of both declaration and replication, the defense should have been anticipated, and the matter in avoidance charged.

Admitting that to be so, as a general rule, see *Miller's Heirs v. McIntyre*, 6 Pet. 61, 64, it has no application to this case. It is perfectly well settled that a special replication is not necessary where the plaintiff proceeds at law: *Per Abbott, C. J.*, in *Murray v. The East India Company*, 5 Barn. & Ald. 204, 215,

216; *Soulden v. Van Rensselaer*, 9 Wend. 293, 295, 297, 298, and the cases there cited; *Dean v. Hewitt*, 5 Id. 257; *Pinkerton v. Bailey*, 8 Id. 600. The admission of a debt is available to take it out of the statute of limitations, whether that admission be express or tacit; whether made to the party or a stranger: and it may be implied from the conduct of the party. These propositions are all clearly established by the cases, collected in a late English treatise, *Wilkinson on Limitations*, p. 61, c. 4. But there is no doubt, as contended by the appellant's counsel, that the admission should be without reserve; and before it is allowed, the mind should be clearly satisfied upon the evidence, that such an admission has been made out. Having premised thus much, we come to the inquiry how far the rules by which we are to govern ourselves may be satisfied by the proofs in the cause.

[The judge here again adverted to the proofs in the cause, and after reviewing the testimony came to the conclusion that an admission of the debt within six years of the time of the filing of the bill was clearly proved. Upon the whole case, therefore, he was in favor of an affirmance of the decree of the chancellor.]

Senator Edwards and Maison also delivered opinions in favor of an affirmance of the decree.

On the question being put, Shall this decree be reversed? the members of the court present at the decision unanimously voted in the negative.

Whereupon the decree was affirmed.

SIGNING A CONTRACT ONLY BY THE PARTY TO BE CHARGED is sufficient to satisfy the statute of frauds: *Douglass v. Spears*, 10 Am. Dec. 588; *Russell v. Nicoll*, 20 Id. 670. See also the note to *Merritt v. Clason*, 7 Id. 288. To the same effect are *Johnson v. Dodge*, 17 Ill. 442; *Farwell v. Lowther*, 18 Id. 255; *Estes v. Furlong*, 59 Id. 302; *Old Colony R. R. Corporation v. Evans*, 6 Gray, 33; *Champlin v. Parish*, 11 Paige, 410; *Edwards v. Farmers' Fire Ins. & L. Co.*, 21 Wend. 492; *Woodward v. Aspinwall*, 3 Sandf. 276; *Earl v. Campbell*, 14 How. Pr. 333; *White v. Schuyler*, 31 Id. 41; S. C., 1 Abb. Pr. (N. S.) 302; *Worrall v. Munn*, 5 N. Y. 248; *Briggs v. Partridge*, 64 Id. 384, all recognizing *McCrea v. Purmort* as a valuable authority on this point.

ACTION FOR MONEY HAD AND RECEIVED is an equitable action: *Kennedy v. Baltimore Ins. Co.*, 6 Am. Dec. 499.

PAROL EVIDENCE AFFECTING CONSIDERATION CLAUSE OF DEED, admissibility of: See *Schermerhorn v. Vanderheyden*, 3 Am. Dec. 304 and note; *O'Neale v. Lodge*, 1 Id. 377; *Sneel v. Hooper*, 5 Id. 691; *Harvey v. Alexander*, 10 Id. 510; *Bowen v. Bell*, 11 Id. 286; *Graves v. Carter*, Id. 786 and note; *Harrison v. Laverty*, 13 Id. 283; *Betts v. Union Bank of Maryland*, 18 Id. 283 and note;

Whitbeck v. Whitbeck, Id. 503 and note; *Bullard v. Briggs*, 19 Id. 292; *Tyler v. Carlton*, 20 Id. 357; *Belden v. Seymour*, 21 Id. 661.

The principal case is regarded as a leading decision on this subject, and is recognized as establishing the doctrine that, except for the purpose of showing that a deed was without consideration and thereby avoiding it, parol evidence is always admissible between the parties to such deed to explain the consideration clause by proving that the consideration was not paid, though acknowledged therein to have been paid, or by proving that it was not paid in money as therein expressed, but in some other manner: *Bennett v. Solomon*, 6 Cal. 137; *Spear v. Ward*, 20 Id. 676; *Coles v. Soulsby*, 21 Id. 51; *Peck v. Vanulenberg*, 30 Id. 22, 57; *Rhine v. Ellen*, 36 Id. 370, 371; *Morris v. Tillson*, 81 Ill. 616; *Clapp v. Tirrell*, 20 Pick. 250; *Goward v. Waters*, 98 Mass. 599; *Hull v. Adams*, 1 Hill, 603; S. C. in the court of errors, 2 Denio, 310; *Goodell v. Pierce*, 2 Id. 662; *Greenvault v. Davis*, 4 Id. 647; *Bingham v. Weiderwaz*, 1 N. Y. 514; *Halliday v. Hart*, 30 Id. 494; *Baker v. Union Mut. Life Ins. Co.*, 43 Id. 287; *Arnot v. Erie Railway Co.*, 67 Id. 321; *Frink v. Green*, 5 Barb. 457; *Averill v. Loucks*, 6 Id. 24; *Rose v. Rose*, 7 Id. 177; *Graves v. Porter*, 11 Id. 593; *Fellows v. Emperor*, 13 Id. 100; *McNulty v. Prentice*, 25 Id. 212; *Stackpole v. Robbins*, 47 Id. 219; *Rosboro v. Peck*, 48 Id. 95; *Sanford v. Sanford*, 61 Id. 302; S. C., 5 Lans. 493; *Anthony v. Harrison*, 14 Hun, 210, per Frost, referee; *Barnum v. Childs*, 1 Sandf. 62; *Murray v. Smith*, 1 Duer, 428; *Walcott v. Ronalds*, 2 Rob. 620; *Upson v. Badeau*, 3 Brad. 15; *Baker v. Connell*, 1 Daly, 470; *Henderson v. Fullerton*, 54 How. Pr. 425; *Doe v. Beardsley*, 2 McLean, 414; *Taggart v. Stanberry*, Id. 546. But such evidence is not admissible to show that there was no consideration for the deed and thus to avoid it, no fraud appearing. To this doctrine also the principal case is cited in *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 509; *Grout v. Townsend*, 2 Id. 557; S. C. in the court of errors, 2 Denio, 340; *Beach v. Cooke*, 28 N. Y. 537; *Arthur v. Arthur*, 10 Barb. 24; *Stackpole v. Robbins*, 47 Id. 219; *Bolton v. Jacks*, 6 Rob. 234.

RELEASE AND RECEIPT, DISTINCTION BETWEEN.—The distinction pointed out in the principal case between a release and a receipt, to the effect that the former extinguishes a pre-existing right, and therefore can not be contradicted by parol, while the latter is merely evidence of a fact, and therefore may be contradicted, is noticed with approval in *Stearns v. Tappin*, 5 Duer, 297. See also *Prince v. Lynch*, 38 Cal. 532, citing the case to the point that a release extinguishes the obligation.

STATUTE OF LIMITATIONS, OPERATION OF IN EQUITY: See the note to *Frame v. Kenny*, 12 Am. Dec. 368; see also *Reeves v. Dougherty*, 27 Id. 496, and *Belknap v. Gleason*, Id. 721, and other cases in this series cited in the notes thereto.

ACKNOWLEDGMENT TAKING DEBT OUT OF THE STATUTE OF LIMITATIONS: See *Olcott v. Scales*, 21 Am. Dec. 585; *Frey v. Kirk*, 23 Id. 581; *Austin v. Bostwick*, 25 Id. 42; *Newlin v. Duncan*, Id. 66; *Wenman v. Mohawk Ins. Co.*, 28 Id. 464, and other cases in this series referred to in the notes to those decisions. To the point that the admission of a debt is available to take it out of the statute of limitations, whether that admission be express or tacit, whether made to the party or to a stranger, and that it may be implied from the conduct of the party, the foregoing case of *McCrea v. Purmort* is cited as authority in *Reid v. McNaughton*, 15 Barb. 183; *Philips v. Peters*, 21 Id. 359. In *Van Alen v. Feltz*, 32 Id. 143; S. C., 9 Abb. Fr. 282, the case is cited also as to the effect of an acknowledgment or new promise in taking a case out of the statute of limitations.

FARMERS' INSURANCE AND LOAN CO. v. SNYDER.

[16 WENDELL, 481.]

WARRANTY IN AN INSURANCE POLICY, either express or implied, is in the nature of a condition precedent to a recovery, and avoids the contract if not strictly complied with.

MISREPRESENTATION MUST BE MATERIAL TO THE RISK, in order to avoid a policy, but if material to the risk it will have that effect, whether it is made designedly or by mistake.

REPRESENTATION NEED NOT BE LITERALLY ACCURATE, even as to a matter material; substantial correctness is enough.

JURY IS TO DECIDE WHETHER A MISDESCRIPTION OF the property in the survey was fraudulent, or materially affected the risk.

MISDESCRIPTION OF A BUILDING, BY A MISTAKE of the surveyor, in stating that a stone partition running through the building extended to the level of the roof, when in fact it was several feet below that level, will not avoid a policy on a stock of goods described as contained in such building, where the risk is not shown to have been materially increased.

REFERENCE IN A FIRE POLICY TO THE APPLICATION AND SURVEY as containing a particular description of the property does not constitute such description a warranty, but a representation only, unless there is something in the policy to show that it is the intention to make the description a warranty.

ERROR from the supreme court in an action on a policy of insurance against fire, on a stock of goods described as contained in a stone building with shingle roof, "more particularly described in application and survey" furnished by the insured, "filed No. 938 in the office of the underwriters." In the survey the building was described as "fifty-six by thirty-five feet, built of stone, shingle roof, one story high, garret over the whole, thick stone partition running lengthwise through the building to the roof, one part occupied" by the assured, the other by another person. As a matter of fact, it appeared on the trial that the stone partition referred to did not extend to the roof in any part, but only to the floor of the garret which rested upon it, and that the side walls upon which the eaves rested were five feet higher than the partition. The defendants insisted that the description in the policy and survey constituted a warranty, of which the misdescription was a breach avoiding the policy. The judge, however, charged the jury that the survey was not part of the policy, so as to be a warranty, but merely a representation; that the misdescription was not in itself a bar to the action, and that it was for the jury to decide whether there was any fraudulent misrepresentation or concealment, or whether the risk was increased by the particulars in which the description was defective. The defendants ex-

cepted, and after a verdict against them, moved for a new trial, which was denied: See 13 Wend. 92. Judgment on the verdict, and the defendants brought error.

B. F. Butler, United States attorney-general, for the plaintiffs in error.

S. Stevens, for the defendant in error.

WALWORTH, Chancellor. The principle is well settled that every warranty on the part of the assured, whether express or implied, is in the nature of a condition precedent to the payment of the loss, and must be strictly complied with, or the policy is void. In this respect there is a material difference between a warranty and a representation; which latter is a matter of collateral information or intelligence relative to the subject and nature of the risk to be assumed, which in itself must have been calculated to increase the responsibility of the underwriter, or to have induced him to assume the risk for a smaller premium than he would otherwise have required. In other words, it must be a misrepresentation of a matter material to the risk, either designed or otherwise. This is the legal and commercial meaning of the term misrepresentation, as used in the second condition annexed to the policy in this case: which declares that if any person insuring a building or goods in the office of the company shall make any misrepresentation or concealment, or if after the expiration of the policy, and before the renewal thereof, the risk shall be increased by any means within the control of the assured, or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, the insurance shall be void. The question was therefore properly submitted to the jury to decide, as a matter of fact, whether there was a fraudulent misrepresentation or concealment in the survey, or an increase of the risk or hazard by the facts and circumstances in which the building varied from the description in the survey. I do not understand the survey on its face as calculated to convey to the underwriters the impression that the stone partition extended up through the garret to the highest point of the roof, so as to divide the garret, as well as the other part of the building, into two distinct and separate apartments—as that would be not only a very unusual way of building, but would be inconsistent with another specification in the survey, to wit, that there was a garret extending over the whole building. This part of the description certainly could not have been intended

to convey to the underwriters the information that a one-story building with a roof of shingles had a vacant space between the ceiling of the rooms below and the roof, as that was a fact that must be known to everybody who ever saw a building with a shingled roof; but this description was intended to convey to the insurers the information that there was a room usually called a garret, and capable of being occupied as such, over the whole of the one-story building of fifty-six feet by thirty-five. The only error in the description, therefore, was in inducing the underwriters to suppose that the wall which ran lengthwise through the building and as high up as the garret floor, was also as high as the roof or eaves of the building; that is, that the top of the walls, or the plates upon which the lower part of the roof rested, were on a level with the garret floor, and with the top of the stone partition, on which it also rested. In this there was undoubtedly a misrepresentation, or rather a mistaken description; as the walls or plates upon which the lower part of the roof rested were several feet above the garret floor and partition wall. But I can not see how that mistake of the surveyor, which is accounted for by him from the circumstance that he did not go above the garret floor to look, there being some temporary difficulty which prevented him from doing so, could have altered the risk assumed by these underwriters, to their prejudice. Neither do I believe, in point of fact, that the circumstance of the partition wall, and the garret floor which rested upon it, being a few feet lower than the roof, would ever have induced any underwriter to decline the risk or to have increased the premium upon the policy. It is a well-known fact, and which also appears from the proposals annexed to this policy, that fire insurance companies in this state make a general classification of hazards in reference to the materials and construction of the buildings insured, or in which the subject-matter of the insurance is deposited or kept, and in reference to their location and the manner in which they are occupied, and that their rates of premium are usually regulated accordingly. A false or mistaken representation, therefore, from which the underwriters might be induced to suppose the risk belonged to a lower instead of a higher class of hazard, would, if caused by the fraud or even mistake of the assured or his agent, be sufficient to avoid the policy; but in reference to all matters of minor importance, such as whether the building is a few feet more or less from an adjacent building, or whether the rooms, partitions, staircases, etc., are precisely as stated by the party

insured, it must always be a mere question of fact to be determined by the jury whether the misrepresentation was fraudulent, or materially varied the nature of the risk, to the prejudice of the insurer; unless the underwriter thinks proper to put it in the shape of a warranty, and thus make it a part of the contract that the assured shall not be paid his loss, if there is any, even an unessential variance from the description of the property or its location as to other contiguous buildings, etc.

In the present case the verdict of the jury upon the questions submitted to them by the judge was warranted by the evidence, and established the fact that there was no fraud, misrepresentation, or concealment which ought to avoid the policy, either upon the general principles of law relative to misrepresentation or concealment, or by the terms of the second condition of the proposals referred to in the body of the contract; which second condition, in this respect, is only an embodying of the settled principle of law on the subject of misrepresentation and concealment in the conditions upon which the insurances of the company are to be made. Where the representation is material, it must be substantially correct, although it need not be literally and mathematically accurate in every particular. If there is a misrepresentation in relation to an immaterial matter, it does not affect the validity of the contract, especially where, as in this case, it was made by mistake and without any intention to deceive or defraud the underwriters. Such being the construction which this company undoubtedly intended should be put upon this clause in the conditions annexed to the policy, this part of the conditions of their proposals for insurance was perfectly right and proper on the part of the company (although the law itself would have protected their rights to the same extent), as this condition was calculated to put the person applying for insurance upon his guard in relation to any representations which he might make, so that he might be careful to have them substantially correct. But if the company had expected and intended that a construction would be put upon this clause of the condition which should render the policy void if the assured, who resided out of the city, happened to make a mistaken representation in reference to the situation of the property intended to be insured in any unimportant particular, although it did not materially vary the risk, the clause would operate as a fraud upon the assured; as the officers of the corporation must have known that not one survey in ten

from the country would have been literally and mathematically accurate in every respect.

Having disposed of this part of the case, it remains for me to consider the question whether the reference to the survey in the body of this policy, and which, I believe, is usually referred to in fire policies in the same way, is to have the same effect as a warranty contained in a marine insurance, so as to render the policy void if the description in the survey is not perfectly accurate in every particular; or whether the survey thus referred to ought to be considered as a representation or description of the property insured, or of the building in which it is deposited or kept, and binding upon the assured as a representation, if furnished by him or his agent, and not by the agent of the company. A marine policy is anomalous in form, though in other respects it is to receive the same construction as other contracts. Hence it has been correctly held, that a stipulation, or clause or memorandum, as it is sometimes called, although written in the margin, on the back, or on any other part of the same paper, if made before or at the time of the underwriting of the policy, and intended as a part thereof, is considered as a part of the contract itself in the same manner as if it had been inserted in its proper place, in the form of a stipulation or agreement, in the body of the policy. This accounts for the different decisions of Lord Mansfield in the cases of *Bean v. Stupart*, 1 Doug. 11, and *Kenyon v. Berthon*, referred to in a note to the last case, in both of which he held stipulations written upon the policy itself as strict warranties, and in the cases of *Pawson v. Barnevelt*, and *Bize v. Fletcher*, referred to in the same note; in the first of which he held that a written memorandum inclosed in the policy, and shown to the underwriter at the time of his signature, was not a strict warranty, but a representation merely; and in the last he held the same as to a memorandum upon a separate piece of paper, but which was actually attached to the policy by a wafer at the time the policy was underwritten.

I have no doubt that it is perfectly competent for the underwriter, by the insertion of a stipulation to that effect in the policy itself, to give to a statement of facts contained in a separate paper or instrument, sufficiently referred to and identified, all the effect of an express warranty inserted in the body of the policy. But in the anomalous and informal instrument called a marine policy, many things have been construed into express warranties, which, if found in other contracts, would be per-

fectly unintelligible, or would be considered as immaterial matters; and the cases above referred to show that the principle of converting everything contained in a policy into an express warranty, although there is nothing in the form of the memorandum itself to show that such was the intention of the parties to the contract, is not to be extended to any memorandum or paper writing not contained in the policy itself, or written upon the same paper with the policy so as to be considered as contained therein. This I take to be the settled law at this time in relation to marine insurances; but I confess I have doubts whether the principle of construing every matter of mere description contained in the body of the policy, although not material to the risk, into an express warranty which is to be literally complied with, should be applied with the same strictness to fire policies, where the misdescription is most generally the mistake of the underwriter's own surveyor. In the present case, however, even if we test the construction of this policy by these settled principles of marine insurance law, it will be found that there is no misdescription of the building in the policy itself, or in any stipulation, clause, or memorandum, written or printed on the same paper therewith. Neither is the survey, furnished by the assured, referred to in this policy in such a manner as to show clearly that the assured was to be considered as warranting that everything contained in that survey was literally and mathematically correct; and as there was neither a warranty nor a misrepresentation material to the risk assumed by the underwriters, they were properly chargeable with the loss. The judgment should therefore be affirmed.

On the question being put, Shall this judgment be reversed? all the members of the court present, twenty-three in number, voted in the negative.

Whereupon the judgment of the supreme court was affirmed.

WARRANTIES AND REPRESENTATIONS IN INSURANCE CONTRACTS, distinction between and effect of: See the note to *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec. 462. See also *Duncan v. Sun Fire Ins. Co.*, 22 Id. 539; *Jefferson Ins. Co. v. Cotheal*, Id. 567, and cases cited in the notes thereto. To the point that a warranty in a policy of insurance as to the situation or description of the property is in the nature of a condition precedent, and that if such warranty is not strictly complied with the contract will be void, the principal case is cited in *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Barb. 125; *Huntley v. Perry*, 38 Id. 571; *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N.Y. 378. But a misrepresentation, in order to avoid the contract, must be as to some matter material to the risk, and then it will have that effect if it be made either fraudulently or by mistake: *Higbee v. Guardian Mut. Life Ins. Co.*, 66

Barb. 479; *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 127, both citing *Farmers' Ins. and Loan Co. v. Snyder*.

MISDESCRIPTION OF INSURED PROPERTY: See the note to *Fowler v. Etna Fire Ins. Co.*, 16 Am. Dec. 462, and the other cases above referred to. See also *Etna Fire Ins. Co. v. Tyler*, ante, 90.

APPLICATION OR PROPOSAL FOR INSURANCE, when a part of the policy: See *Duncan v. Sun Fire Ins. Co.*, 22 Am. Dec. 539, and *Jefferson Ins. Co. v. Cothcal*, Id. 567 and the notes thereto. And, generally, as to the effect of the application as evidence to explain or control the policy, see *Norris v. Insurance Co.*, 2 Id. 360. That a reference in the policy to a survey or other paper, will not of itself change a representation therein to a warranty, is a point for which *Farmers' Ins. and Loan Co. v. Snyder* is recognized as authority in *Burrill v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 690. But in order to constitute a collateral paper a part of the contract, it must be referred to in terms as such, or in such a manner as to show that this was the intention: *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 520. Where the description of the property contained in the application and survey is referred to and made a warranty, the warranty extends no further than to the description: *Howard Fire and Marine Ins. Co. v. Cornick*, 24 Ill. 462. In *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 78, the principal case is cited to the point that the contract between the insurer and insured is the policy, conditions, and application, which are in writing. In that case the application and the conditions were referred to as forming part of the policy. In *Smith v. Empire Ins. Co.*, 25 Barb. 504, after citing a large number of authorities for the doctrine that stipulations in the application amount to an express warranty where the application is referred to in the policy for a more particular description of the property, and as forming part of the policy, Balcom, J., speaks of the principal case as follows: "The case of the *Farmers' Ins. and Loan Co. v. Snyder*, 16 Wend. 481, does not show that the statement in the plaintiff's application, as to incumbances, was a misrepresentation; and if it did, the authorities above cited show that it could not be followed."

PARKER v. WALROD.

[16 WENDELL, 514.]

CONSTABLE SUED FOR AN ACT DONE BY VIRTUE OF HIS OFFICE may, under the general issue, give evidence of any matter which is a defense to the suit.

LIABILITY OF CONSTABLE FOR SEIZING STRANGER'S PROPERTY.—Where, after a constable has levied an attachment on the wagon of a debtor, in possession of a stranger, the latter repossesses himself of the wagon and, without the constable's knowledge, substitutes cleaves and whiffletrees of his own for those on the wagon, and the constable afterwards retakes the wagon with such cleaves and whiffletrees attached, he is not liable in trespass therefor, but, if at all, only in trover after a demand.

PRIOR POSSESSION UNDER A CLAIM OF PROPERTY is sufficient *prima facie* evidence of title in a chattel in an attachment debtor to cast upon a third person the burden of proof as to ownership, as against an officer seizing the same under an attachment regular on its face.

PRODUCTION OF AN ATTACHMENT REGULAR ON ITS FACE from a court having general jurisdiction of the subject-matter, without showing that the

requisites of the statute have been complied with in issuing the attachment, is sufficient to protect the attaching officer as against one who does not show a title which would be good against the attachment debtor.

OFFICER IS PROTECTED IN EXECUTING PROCESS regular on its face and apparently within the jurisdiction of the court issuing it, such court having jurisdiction of the subject-matter and of such process.

ERROR from the supreme court in an action of trespass brought by Parker against Walrod in a justice's court for entering the plaintiff's close and taking away clevices and whiffletrees attached to a wagon. Plea, the general issue, with notice of certain special facts. It appeared that the defendant, a constable, had seized a certain wagon in the plaintiff's possession, under attachments against one Godfrey, who had been in possession of the wagon under a claim of title until he absconded; that the plaintiff repossessed himself of the wagon, and, without the defendant's knowledge, took off the clevices and whiffletrees and put on others of his own, and that afterwards the defendant again seized the wagon, with the clevices and whiffletrees thus attached thereto, which was the trespass complained of. The plaintiff introduced no evidence whatever of title to the wagon. The defendant, in justification of the alleged trespass, introduced in evidence the attachments against Godfrey, which were admitted against the objection of the plaintiff. Verdict and judgment for the defendant before the justice, which was reversed on certiorari in the common pleas, and judgment rendered for the plaintiff, which was reversed on writ of error by the supreme court, and the plaintiff brought the case here.

WALWORTH, Chancellor. The defendant being sued as a constable for an act done by virtue of his office, had the right, under the general issue, to give any matter in evidence which was a defense to the suit: 2 R. S. 353, sec. 15. As he was sued for entering the plaintiff's close as well as for taking the whiffletree and clevices, it was proper to give the attachments in evidence as a justification for the entering of the close to take the property of the person against whom the attachments had issued, even if he was liable for taking the property of the plaintiff which had been attached to the wagon in the manner stated by the witness. I have no doubt, however, that the supreme court was right in holding that if the plaintiff or his servant had exchanged the whiffletree and clevices, and affixed his own to the wagon without the knowledge or consent of the constable, an action of trespass would not lie against the latter

for taking them away with the wagon, unless he was aware of the fact that they had been thus changed, provided he was justifiable in taking the wagon itself. From the evidence before the justice, there can be no doubt that the constable acted in good faith, believing that the whiffletree and cleaves were the same which he had originally attached with the wagon as the property of Godfrey. It was the plaintiff's own fault, therefore, that this mistake occurred, and if any action could be sustained against the constable without returning to him the whiffletree and cleaves which actually belonged to the wagon, of which I have some doubt under the circumstances of this case, it must have been an action of trover for refusing to return the property to the plaintiff, after the constable was informed of the mistake which had occurred. The defense of the constable, therefore, depended mainly upon the question whether he was justified in taking the wagon itself under the attachment as the property of Godfrey.

The evidence before the justice was sufficient, *prima facie*, to prove that the wagon and harness were the property of Godfrey, as he was in possession thereof, claiming to be the owner, before he ran away. This prior occupancy was sufficient evidence of property in Godfrey to cast upon Parker the burden of proving a previous right in himself, or a subsequent title to the property derived from such prior occupant; and as no such proof was given or offered before the justice, the defense of the constable was complete if he had attachments against Godfrey which authorized the taking of his property. The giving of those attachments in evidence was therefore not only pertinent to the issue between these parties, but an essential point in the defense of the constable.

As the attachments were regular on their face, and the justice had general jurisdiction over the subject-matter of the suits in which they were issued, the burden of proof lay upon Parker to show that the requisites of the statute had not been complied with, even if the plaintiff's counsel is right in supposing that the constable could not protect himself under process of a court of competent jurisdiction, apparently regular, and where he had not the means of knowing that the court had exceeded its jurisdiction in the manner of issuing such process. The only exception to this rule, of which I am aware, is the case of an officer justifying under an execution for the taking of goods claimed by a stranger; but even in that case, the decision in *High v. Wilson*, 2 Johns. 46, and in the several cases

in the English courts which preceded it, went no further than to require the production of the judgment in a suit with a stranger who showed in himself a title to the property, which was good as against the defendant in the execution.

In *Lake v. Billers*, 1 Ld. Raym. 733; *Martin v. Podger*, 5 Burr. 2631; *Ackworth v. Kempe*, 1 Doug. 41; and in the case of *High v. Wilson*, before referred to, the plaintiffs showed title in themselves, derived from the defendant in the execution before the lien of the execution attached thereon. The execution of itself, therefore, was no defense to the officer, who could only make it available against a stranger to it, by connecting it with a judgment, and then showing that the transfer of the property to the person thus claiming it was fraudulent and void as against the creditor who had recovered such judgment. In this view of the subject, it will be seen that the cases referred to may be sustained upon principle, as the production of the judgment record was necessary to establish the fact that the execution issued upon a judgment rendered for a cause of action which existed, or for a debt contracted, before the issuing of such execution, otherwise there would have been no creditor as against whom the transfer of the property could have been fraudulent; but there are many cases in which it has been held, that where the officer has levied upon property in the possession of the defendant in the execution, and it has been subsequently taken from him by a stranger, he may sustain an action against such stranger upon his title and possession under the execution alone, without producing the judgment to show that the execution had regularly issued. If there is any case in which it has been held that a production of the judgment was necessary to protect the officer against a mere intermeddler, who had no claim to the property or to the possession thereof even as against the defendant in the execution, the court must have erred in following the decision in *Lake v. Billers*, and the other cases of that class, to which I have before referred, while the principle upon which those decisions were based has been entirely overlooked or misunderstood by the court.

Having disposed of this class of cases, which have been supposed by many to be anomalous in their character, and to form an exception to the general rule, I am prepared to go, with Mr. Justice Marcy, in his opinion, in the case of *Savacool v. Boughton*, 5 Wend. 170 [21 Am. Dec. 181], in declaring the settled rule of the common law, at least in this state, to be, that a mere ministerial officer who executes the process of a

court having jurisdiction of the subject-matter, and having also jurisdiction to issue such process in general, or in certain specified cases, is protected in the execution of such process if it is regular on its face, and apparently within the jurisdiction of the court issuing the same. The several cases on this subject have been so fully and ably examined by that learned judge, in the elaborate opinion to which I have referred, that it would be a useless waste of time for me to attempt to go over the same ground. Suffice it to say that the cases to which he has referred, with one or two exceptions, fully sustain the conclusions at which he arrived on this subject. Even the cases of *Suydam and Wyckoff v. Keys*, 13 Johns. 444, and *Wise v. Withers*, 3 Cranch, 331, which are supposed by Justice Marcy to conflict with this general rule, may perhaps be considered as only forming a reasonable exception to it, and as not coming within the just and equitable principle which protects a ministerial officer in the execution of process, which he is bound to presume to have been legally and properly issued. It is admitted to be the law that the process of a court of inferior jurisdiction will not protect the officer, if the want of jurisdiction to issue the same appears upon the face of the process; and I apprehend also the same principle may be applied to a case where the want of jurisdiction arises from a fact of public notoriety which is legally presumed to be within the knowledge of the officer as well as others; and of which he is, therefore, bound to take notice.

If the decisions in the cases of *Suydam and Wyckoff v. Keys* and *Wise v. Withers* can be supported at all, it must be upon this principle; although in neither of those cases does the court appear to have put its decision upon the ground that the officer was bound to take notice of the fact that the persons who had been assessed, were not residents of his school district, or that the party upon whom the militia fine had been imposed, was a judicial officer of the United States, and, therefore, not amenable to a court-martial for the non-performance of militia duty. It is not necessary, however, that I should express an opinion upon the question, whether these were matters of such public notoriety, in the district where the officer resided, and where the process was to be executed, as to make it the duty of the officer at his peril, to take notice of the fact, that the process was illegal, and issued without authority.

In the case under consideration, the attachments were regular upon their face, and were issued by a court having juris-

diction of the subject-matter of the suits, and having also authority to issue such process, upon a compliance with the statutory regulations on that subject, and there was no fact within the knowledge of the constable, from which he could have supposed that there was any irregularity in the issuing of the attachments. They were, therefore, a sufficient authority to him to enter upon the premises of the plaintiff in error, to take the wagon of Godfrey, the defendant in the attachments. Having the authority to enter and take the wagon, as I have before observed, the constable was not liable to an action of trespass, either for entering upon the close of Parker, or for taking the whiffletree and cleaves which had been attached to the wagon without his knowledge or consent. There was, therefore, no error in the judgment of the justice; and the decision of the supreme court, affirming the same, and reversing the erroneous judgment of the court of common pleas, should be affirmed by this court, with such costs as the statute gives to public officers in cases of this kind.

On the question being put, Shall this judgment be reversed? all the members of the court present, twenty in number, voted in the negative.

Whereupon the judgment of the supreme court was affirmed.

JUSTIFICATION OF OFFICER UNDER PROCESS: See, for an extended discussion of this subject, the note to *Savacool v. Boughton*, 21 Am. Dec. 190; see also *Hall v. Howd*, 27 Id. 696, and *Brainard v. Stilphin*, Id. 532, and other cases in this series referred to in the notes thereto. That an officer will be protected in the execution of process regular on its face, and apparently within the jurisdiction of the court issuing it, such court having general jurisdiction of the subject and of the process, is a position for which the authority of the principal case is recognized in *Parker v. Smith*, 1 Gilm. 415; *Jackson v. Holson*, 4 Scam. 418; *Fullon v. Heaton*, 1 Barb. 555; *Dominick v. Eacker*, 3 Id. 19; *Cross v. Phelps*, 16 Id. 502; *Bovee v. King*, 11 Hun, 253. So held in *Webber v. Gay*, 24 Wend. 487, and *Clearwater v. Brill*, 4 Hun, 730, even though the officer knows the facts alleged to render the proceedings void. But see, to the contrary, *Leachman v. Dougherty*, 81 Ill. 327, referring to the principal case as intimating an opposite doctrine.

PROCESS MAY BE GIVEN IN EVIDENCE BY AN OFFICER WITHOUT THE JUDGMENT or other proceedings upon which it is based, when: See *Carlton v. King*, 23 Am. Dec. 295; *Spoor v. Holland*, 24 Id. 37 and note. The principal case is referred to as an authority as to when it is necessary to produce a judgment, or to prove the proceedings upon which the process issued in order to justify a seizure under such process as against a stranger, in *Gelhaar v. Ross*, 1 Hilt. 119; *Underhill v. Reinor*, 2 Id. 322; *Hall v. Stryker*, 29 Barb. 111; S. C., 9 Abb. Pr. 352; S. C. in the court of appeals, 27 N. Y. 604, where it is said that the decisions referred to on that point have no very strong bearing on the question before the court in that case.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

MERRILL v. ITHACA AND OWEGO R. R. Co.

[16 WENDELL, 586.]

RECOVERY FOR WORK DONE UNDER SPECIAL CONTRACT.—A party tacitly adhering to the terms of a special contract for the performance of labor, where, owing to misfortune or other cause, without the fault of either party, the work is not finished within the stipulated time, may recover under the common counts in assumpsit for the work, but is restricted to the rate of compensation stipulated in the contract.

PARTY PREVENTED FROM COMPLETING SUCH CONTRACT in the time stipulated, by the fault of the other party, but going on with the work after the time until compelled to abandon it, may recover the value of the work done on a *quantum meruit*, and is not governed by the stipulations of the contract.

BOOK ENTRIES MADE, WHEN NO RIGHT TO MAKE THEM EXISTED at the time, are not admissible in evidence, as where work was done under a special contract and entries thereof in the plaintiff's books were sought to be used as evidence on a *quantum meruit*.

ORIGINAL ENTRIES MADE IN THE USUAL COURSE of business are not admissible unless the person who made them is produced or is shown to be dead.

ENTRIES MADE BY ONE WHO IS LIVING AND PRESENT to verify them by swearing that he believes them to be true, are admissible in evidence, though the party making them has forgotten the facts.

CHECK-ROLLS KEPT BY A CONTRACTOR WITH HIS WORKMEN are not evidence of the amount of work done, against the railroad company for whom it was done, unless verified by the oath of the person who made the entries therein, if he be living.

ASSUMPSIT for work and services, and for materials furnished by the plaintiffs, as contractors, in constructing the defendants' railroad, the declaration containing only the common counts.

It was proved before the referees, to whom the case was referred, that the work was done under certain sealed contracts between the parties in which the mode of performing the work, the rate of compensation, and the manner of ascertaining the amounts due from time to time, were stipulated. Part of the work was to have been completed by July 15, 1832, and the whole of it by September 15, 1832. It was not completed within the time, however, owing, as appears from the opinion, to the defendants' fault, but the plaintiffs continued the work, and the defendants continued to pay them according to the estimates and certificates provided for by the contract until May, 1833, when they abandoned the work. Some work was done on sections of the road not embraced in the contract, but it was performed and paid for in the manner stipulated by the contract. The referees permitted the plaintiffs to prove, in the manner indicated in the opinion, under the *quantum meruit* count, the amount and value of the work done, which showed them entitled to about twelve thousand dollars more than they would receive if paid according to the provisions of the contract. The report being in favor of the plaintiffs, the defendants moved to set it aside.

D. D. Barnard, for the defendants.

M. T. Reynolds and S. Stevens, for the plaintiffs.

By Court, COWEN, J. After such an exact tacit adherence, on the side of the plaintiffs, as appears from the evidence in this case, to the written terms of the contracts, without one word that they intended to alter their rates of charge, it would be a fraud upon the company were they allowed to change their ground. It is not denied that they may resort to the general counts. Both parties having assented that the work should go forward after the day; that may be so. It is clearly so as to line C and section 4, if they are not touched by the general provisions of the contract in respect to section 3; yet the rule is well settled, that though there be a deviation, yet the special contract shall be pursued as far as it can be traced and made to apply. Here all the powers of the engineer in chief, with the measures and estimates, may be retained and applied to the whole work, with very little exception. For a plain excess beyond what the parties may have treated as within the articles, there could of course be no objection to allow on the basis of a *quantum meruit*. I am here speaking particularly of the work done on sections 3 and 4. As to section 8, there is no doubt

that all the substantial provisions of the written contract should be applied. The prices and estimates of the engineer in chief would still be conclusive, though we should allow the action of *indebitatus assumpsit*. It is a mere change of remedy. It would be gross injustice to allow any substantial departure from stipulations, in reference to which the parties all along acted. No matter for the delay, and no matter which party was so unfortunate as to be the innocent occasion of it. It was the business of either to speak out if a change of terms was in contemplation. Silence was equivalent to saying, "I go on upon the old terms." It is like a tenant holding over in silence. He shall pay his last year's rent. If one party, by his conduct or silence, leads another to believe that he is at work for him on certain wages, he is estopped and shall not add to his demand. I forbear, however, to pursue this branch of the inquiry. I have said so much merely by way of protest against the notion that, because the law is favorable to a remedy in some form, though the covenant may not have been literally fulfilled, it is yet not sedulous to save all the terms of the written contract as far as possible; measures, proportions, prices, bases of estimate, quality of the work, everything fair and honest.

I have so far supposed all delay and embarrassment to have been the result of misfortune; of oversight, miscalculation, or want of forecast in one party or the other, or both; want of skill, if you please, in the conduct of business, and I care not on which side. But there is another view of the case which is decisive in favor of a departure from the original principles and mode of estimate, at the election of the plaintiffs. [Mr. Justice Cowen here reviewed the testimony which had been given in reference to embarrassments to the completion of the job, alleged to have been thrown in the way of the plaintiffs by the defendants, and then proceeds.] I do not say the referees were bound to believe that here was a project by the defendants to abuse the great power confided to them, or to their engineer, by turning it into a means of ruinous delay. It is only necessary to see from the testimony, both direct and circumstantial, as it comes from many witnesses, that they were justified in such a conclusion. There was certainly a conflict of evidence upon the question; but that belonged to the referees. Coming to that conclusion, whose fault is it that this contract was not fulfilled by the fifteenth of July? Whose fault is it that these plaintiffs passed their summer in a state of tantaliz-

ing suspense, and were driven with this large concern on their hands into the ensuing winter? Whose fault is it that a contract, which the engineer thinks performed with adequate skill, would have been profitable on the original estimates, has nearly doubled in the expense of performance? Thus hoodwinked, and led into a train of additional expense which would exhaust two ordinary fortunes; pursuing a pilgrimage of toil in the service of these defendants, which, with an honest and hearty concurrence on their part, might have been finished before the inclement season came, the parties stand clear of the covenant in all its features; and the plaintiffs are entitled to an indemnity upon the principles adopted by the referees. They might have stopped, and sued the defendants for a breach of their covenant. But going on under the circumstances disclosed, there is nothing of the primary principles of estimate which could have been justly applied.

I apprehend, however, that the cause must go back to the referees and be reheard, for an error committed by them in the admission of the kind of evidence by which they appear to have governed themselves in fixing the amount of labor. Finding that the estimates of the engineer-in-chief had become entirely inapplicable and positively unjust, by the baffling of the defendants and delays of the work till the very worst season, it became necessary for the plaintiffs to communicate to the referees, by some other evidence, the amount of labor; and they chose to adopt, as they had a right to do, the number of days in team and other work. For the purpose of ascertaining the days of work performed as between themselves and their laborers, their superintendents were directed to keep what were called check-rolls, and which appear to have been books marked A, B, C, etc., devoted to each section, in which the laborer's name was placed in the left margin; and in a column opposite, and under the day of the week at the top of that column, was written in figures the time he worked on that day. At evening when the laborers came in, the superintendents of the particular section being generally together, the roll of names was called, and the amount of labor reported and marked by some one. The particular superintendent of each squadron of laborers heard the names, and generally either wrote the time or saw it set down, and was capable of deciding to his own satisfaction whether the item was correct. I say generally. These persons, as far as they were called to prove the rolls, did not pretend that the superintendents were always together, that

they always wrote or saw written the accounts of their particular squadron, or always heard the names. Some of them were absent for days and even months; and a considerable portion of these entries must have been made without their actual or potential knowledge. One says he was sick a part of the time, and could not be out with his hands. He, however, saw or superintended the entries at his quarters in the evening.

It does not appear that all the superintendents were sworn before the books were offered, much less all those persons who acted as clerks, and those who were engaged as substitutes during the absence or sickness of the general superintendents. Nor were all the clerks or superintendents, or their substitutes named in evidence and absences accounted for. Indeed, the contrary appears, or is plainly inferable from the case as made out by the affidavit of the attorney for the plaintiffs, into which I have so far looked, because it was adopted as containing the more correct statement of the oral evidence, the case not having been referred to and settled by the referees. The books, of course, continued in the hands or under the control of the plaintiffs. The superintendents sworn expressed a strong general belief of the accuracy of the rolls. Several of them said settlements had been made by their particular rolls, and they always proved to be correct. They remembered names and other circumstances connected with the books, which confirmed them.

Such was substantially the account of these check-rolls when they were offered to and indiscriminately received by the referees; and by what I collect from the case, formed about the only guide in fixing the amount of labor. The affidavit of the defendants' counsel says: "The plaintiffs offered the check-roll books in evidence to prove the amount of labor performed, which was objected to by the defendants' counsel, but admitted by the referees." The answering affidavit of the attorney for the plaintiffs says, that "no objection was made by the defendants' counsel, either to the competency or sufficiency of the proof of the plaintiffs' check-rolls showing the amount of labor done by them on the railroad." This is true according to the affidavit of the defendants' counsel. He does not state that he made difficulty as to the proof of the plaintiffs' check-rolls. In fairness of construction, the defendants' objection was, that though the rolls were well enough proved and identified, yet, still they were not competent evidence for the purpose for which they were offered.

I at first thought the opposing affidavit was disingenuous and and evasive. Such a bad moral aspect may be removed by supposing that it intended to raise the question, whether the objection was sufficiently specific. It might have been more so. It might have said, "You have not rendered a sufficient account of these memoranda to make them evidence. You should have called everybody concerned in making them up, or account for the absence of those persons by showing that they were dead, or at least, beyond the reach of process. We object to the rolls as incompetent, but not to the proof of them." The admissibility of the rolls, however, as showing the amount, we shall see depended on certain preliminary extrinsic proof. The whole offer was objected to upon the state of facts; upon the account of these check-rolls, as derived from a number of superintendents who had been sworn in order to make the proof full for their admission. Yet, says the defendant's counsel, "we object to the offer." Looking to the course that was pursued, I fear it would be hypercritical to say that the objection did not signify a want of the proper preliminaries. I have already adverted in a general way, to the proof of these. Among the superintendents, six were sworn, and called on to give an account of the check-rolls in order to their being offered. The affidavit for the defendants represents one of them as stating that the entries of work were generally made by one of the plaintiffs; and this is not contradicted by the affidavit of the plaintiff's attorney. On the whole, the attention both of referees and counsel must have been turned to the question whether the preliminary proof was sufficient to warrant the offer of the rolls in evidence.

Were these rolls evidence? They were doubtless as nearly safe as was necessary for business purposes at the time; perhaps as producing strong moral conviction on the minds of men under any circumstances. But are such memoranda to be received in evidence in our courts of justice? They would have been legally admissible as books of account between the plaintiffs and their workmen; for they were adopted as the books of both, and kept open for the inspection of each. They are like partners' books between themselves: *Heart v. Corning*, 3 Paige, 566; *Fletcher v. Pollard*, 2 Hen. & M. 544, 549, 550; *Brickhouse v. Hunter*, 4 Id. 363 [4 Am. Dec. 528]; *Jordan v. White*, 4 Mart. La. (N. S.) 335, 339; *Reno v. Crane*, 2 Blackf. 217. The superintendents or others making the entries were agents for both parties: *Union Bank v. Knapp*, 3 Pick. 96, 108 [15 Am. Dec.

181]. But not so as to the defendants. They were not admissible as books of account kept by one dealer with another: 1. Because the plaintiffs had clerks and other witnesses of the labor: *Vosburgh v. Thayer*, 12 Johns. 461; *Kennedy v. Fairman*, 1 Hayw. 458; *Whitfield v. Walk*, 2 Id. 24; *Sterrell's Ex'rs v. Bull*, 1 Binn. 234. 2. They were not the general books of daily account of the plaintiffs; and there was no trust implied that they should keep these accounts for the defendants: *Vosburgh v. Thayer*, 12 Johns. 461; *Lynch v. Hugo*, 1 Bay, 33; *Prince v. Smith*, 4 Mass. 455; *Hough v. Doyle*, 4 Rawle, 291: *per Kirkpatrick*, C. J., in *Wilson v. Wilson*, 1 Halst. 94; *Thompson v. McKelvey*, 13 Serg. & R. 126; *Swing v. Sparks*, 2 Halst. 59; *per Duncan, J.*, in *Curren v. Crawford*, 4 Serg. & R. 5; *Sterrell v. Bull*, 1 Binn. 237. 3. It is not a simple case of charge for services done on a *quantum meruit*, known and recognized as such by both parties at the time. Charges for anything done or delivered under a supposed special contract, but which afterwards become matter of account by operation of law, in consequence of a rescission of the contract, can not be proved by the party's book. There must be a right to charge when the service is done, or the goods delivered: *Bradley v. Goodyear*, 1 Day, 104; *Slasson v. Davis*, 1 Aik. 73, 74; *Peck v. Jones*, Kirby, 289; *Terrill v. Beecher*, 9 Conn. 344. Nor does the case come within the rule allowing a banker's book in evidence, kept by many clerks, only one being sworn to identify it, and to show the manner of its being kept. This was allowed in *Furness v. Cope*, 5 Bing. 114; S. C., 2 Moo. & P. 197. Such a book, so proved, was received to show that a customer of a bank had no funds there. But the banker was not a party; it was the bank ledger of a house which stood indifferent between the parties; and its admissibility was put on the great inconvenience of calling all the clerks.

If then these rolls were receivable at all, it must be on the ground that they were original entries made in the usual course of business. These, unless the person himself who made the entries, is produced, are not evidence, but they may be received when he is dead. This is the English rule of several cases grounded on *Price v. Lord Torrington*, 1 Salk. 285; S. C., 2 Ld. Raym. 873. Nor is the rule confined to the ground stated in that case: that the entry would be evidence to charge the man who made it. This is certainly one reason against allowing the inference of fraud in the entries. But there are several cases collected in the last edition of Phillips' Evidence, vol. 1, 263,

264, 265, showing that this need not be so. It is enough if the person who made the entry be dead, that it was made in the usual course of business. *Doe ex dem. Platteshall v. Turford*, 3 Barn. & Adol. 890, decided since, and *Sutton v. Gregory*, 2 Peak. N. P. Cas. 150, published since, allow the same ground. The cases in the United States are numerous. Among them, are entries by deceased notaries: *Halliday v. Martinet*, 20 Johns. 168 [11 Am. Dec. 262]; or the runner a messenger of a bank: *Welsh v. Barrett*, 15 Mass. 380; or a cashier: *Nichols v. Goldsmith*, 7 Wend. 160; or a merchant's deceased clerk: *Lewis' Ex'r v. Norton*, 1 Wash. Va. 76; *Hunter v. Smith*, 6 Mart. La. (N. S.) 351; *Herring v. Levy*, 4 Id. 383; *Clark v. Magruder*, 2 Har. & J. 77; *King v. Maddux's Ex'rs*, 7 Id. 467. But in this class of cases, we hold that even absence beyond the jurisdiction of the court will not excuse the production of the person who made the entry: nothing short of his death: *Wilbur v. Selden*, 6 Cow. 162. And if the entry was made by a sub-clerk, it can not be received till he be produced, or his death shown: *Id.*

Then were these rolls proved as the original entries of living persons, present to verify them, and testifying that they were made by them, and that they believed them to be true? This would have entitled them to be read as evidence, even though the witnesses might have forgotten the transactions which they recorded. That seems to be the established general rule as to an original entry, though it has been restricted, in this state, to entries in the course of business. In *Sandwell v. Sandwell*, 2 Comb. 445, in 9 Wm. III., at *nisi prius*, in proving words of slander, Holt, C. J., said: "Where a witness swears to a matter, he is not to read a paper for evidence, though he may look upon it to refresh his memory; but if he swears to words, he may read it; if he swears that he presently committed it to writing. A memorandum was denied as evidence which was not made in the course of business, in *Lawrence v. Barker*, 5 Wend. 301. Savage, C. J., distinguished one made of a private conversation for the convenience of the witness, from entries in merchants' books and other cases, where there is a necessity for the entry. The memorandum in question related to a conversation at the time a bond was sold. The witness had forgotten it, though he had no doubt the memorandum was true. Yet the court refused the paper as evidence. The remarks of Chancellor Walworth in *Feeler v. Heath*, 11 Id. 485, recognize a greater latitude in respect to memoranda of dates, numbers, quantities, and sums,

which a witness can not be supposed to remember. Such instances are continually occurring in the course of business; and yet our books of evidence furnish a less intelligible guide on this than on many other subjects of much less practical importance.

There is an obscurity in the text of Phillips' Evidence, one of our best books, running through all his editions, arising from a failure to distinguish between original memoranda and copies or extracts. The attention of the learned constitutional court of South Carolina was drawn to this subject in *The State v. Rawls*, 2 Nott & M. 334. Nott, J., says: "It is true that Phillips, in his treatise on evidence, says, that 'a witness, to assist his memory, may use a written entry or memorandum, or the copy of a memorandum, and if he afterwards can swear positively to the truth of the facts there stated, such evidence will be sufficient; yet if he can not from recollection speak to the fact any farther than as finding it stated in a written entry, his testimony will amount to nothing.' But by a reference to the cases quoted by Phillips, it will be found that the rule as laid down by him applies only to copies of entries, and not to the original. The principal cases relied on are *Doe v. Perkins*, 3 T. R. 752, and *Tanner v. Taylor*, a manuscript report of which Mr. Justice Buller read in that case. The case of *Tanner v. Taylor* was an action for goods sold. The witness who proved the delivery took it from an account which he had in his hand, being a copy, as he said, of the day-book which he had left at home. It being objected that the original ought to be produced, Mr. Baron Legge said if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it; but if he could not, from recollection, swear to the delivery any farther than finding them entered in the books, then the original should have been produced. The case of *Doe v. Perkins* is more directly in point. The question was, at what time in the year the annual leases of several tenants expired. One Aldridge went round with the receiver of the rents, and minuted down their declarations respecting the times when they severally became tenants. When Aldridge was examined, the original book was not in court; but he spoke of the dates of the several tenancies, from extracts made by himself out of that book, confessing upon his cross-examination, that he had no memory of his own of those specific facts; but that the evidence he was giving as to those facts was founded altogether upon the extracts which he had made from the above-mentioned book. This evidence was ob-

jected to, on the ground that as the witness did not pretend to speak to facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book ought to be produced. The presiding judge, however, admitted the evidence, and the plaintiff had a verdict. On a motion for a new trial, Lord Kenyon, after advert-
 ing to the case of *Tanner v. Taylor*, above mentioned, said that the rule appeared to have been clearly settled, and that every day's practice agreed with it; and that comparing the case with the general rule, the court were clearly of opinion that Aldridge, the witness, ought not to have been permitted to speak to facts from the extracts which he made use of at that trial, and a new trial was granted. The same rule is laid down in *Peake's Evidence*." It is more important to recur to the original and leading authorities, because several adjudged cases proceeding without examination of them, have repudiated original and well-authenticated memoranda merely because the witness, at the time of the trial, failed to recollect the facts contained in them. Such was the case of *Calvert v. Fitzgerald*, 1 Litt. Sel. Cas. 388, and such were evidently the views of Tilghman, C. J., in *The Juniala Bank v. Brown*, 5 Serg. & R. 232, and of Duncan, J., in *Smith v. Lane*, 12 Id. 87.

In *Maugham v. Hubbard*, 2 Man. & Ry. 5, 7, a witness said, from seeing his original entry, he had no doubt he had received the money. Lord Tenterden, C. J., thought his statement was equivalent to saying that he knew and recollected, independently of the book. But Bayley, J., did not place the same construction on the language. Yet he was for receiving the entry in evidence, though the witness could not remember the fact. He likened the case to proof of the execution of a deed by a subscribing witness. Though he may state that he does not recollect the fact of the deed being executed in his presence, but that seeing his own signature, he has no doubt that he saw it executed; that, said the judge, has always been received as sufficient proof of its execution. His opinion was given to the same effect in *Lloyd v. Freshfield*, 2 Car. & P. 325.

A great variety of American cases have arisen where the witness, having made the entry or memorandum, could swear to his belief of its truth, but had entirely forgotten the facts which he recorded, in which the paper thus attested has been received and read in evidence to a jury. A memorandum in respect to a gambling transaction was so received against a criminal: *The State v. Rawls*, before cited. Nott, J., as I noticed before of

Bayley, J., likens it, in this case, to the forgetting of an attestation, or to a clerk forgetting entries in a merchant's book. So the notes of evidence by counsel were received, though he could not remember the facts: *Rogers v. Burton*, Peck, 108, 109, 118; *Clark v. Vorce*, 15 Wend. 193 [*ante*, 53]. The entry of a bank clerk, who had forgotten the fact: *Farmers and Mechanics' Bank v. Boraef*, 1 Rawle, 152; of a notary's clerk, who had forgotten the fact he had entered of notice to an indorser: *Haig v. Newton*, 1 Rep. Const. Court, 423, 424; of a town clerk, who had forgotten his entries of charges for penalties: *Corporation of Columbia v. Harrison*, 2 Id. 213; of a notary entering a notice which he had forgotten: *Bullard v. Wilson*, 5 Mart. La. (N. S.) 196; with many other cases to the same effect. There is a class of cases in Pennsylvania, arising out of Lord Kenyon's rule, requiring the very words of a deceased witness to be remembered, when his testimony is offered on a second trial, also going far to illustrate the connection which the law requires between original notes and memory. Several of them hold that the sworn notes of counsel may be read, giving the substance of what the witness swore. See also the decision of this court in *Clark v. Vorce*, 15 Wend. 193 [*ante*, 53]. I will only add, that taking the American cases together, they form a commentary upon this kind of evidence clear and copious, by which the views of Nott and Bayley, JJ., are entirely sustained. The result is, that original entries, attested by the man who makes them, may be read to the jury, though he remember nothing of the facts which they record.

But to make the memorandum or entry competent evidence, the witness must make the entries himself: *Glover v. Hunnewell*, 6 Pick. 222, though this rule is not without its exceptions. Where some of the entries were made by the witness and some by the party, it was held that the evidence should be confined to the witness' own entries, unless he knew the facts set down by the party, and read them over shortly after the transaction: *Beddo v. Smith*, 1 Ala. 397, 398. And where a tradesman's clerk entered all goods sold in a waste-book, from his own knowledge, which the tradesman, the plaintiff, copied day by day into the ledger, in presence of the clerk, who checked them as they were copied, the clerk was allowed to use the ledger as an original book—otherwise, said Patteson, J., the original or waste-book should be produced. He put the production of the original on the legal rule which requires the best evidence: *Burton v. Plummer*, 2 Ad. & El. 341. Denman, C. J., said the

entries were copied while the transactions were yet fresh in the clerk's memory: *Id.* Great care is taken by courts to guard against forgery and interpolation in these memoranda. The opposite counsel are entitled to see and cross-examine the witness in respect to them. *Per* Huston, J., in *Cox v. Norton*, 1 Penn. 414, 415; *St. Clair v. Stevens*, 1 Car. & P. 522;¹ *Rex v. Ramsden*, 2 Id. 603. Best, C. J., says in *Jones v. Stroud*,² that he once committed a witness for having a simulated memorandum on the trial, though he immediately explained the matter, candidly admitting that he had drawn it up that morning. While on the stand and apparently searching for the paper in his pocket, he was ordered to hand it to the court, which he did with the explanation.

To return to the case at bar: I collect from the affidavits in the first place that a considerable share of the entries on the check-rolls were made by the plaintiffs; and such as were, do not appear to have been read by witnesses who knew of the facts entered, immediately after they were set down; but be that as it may, they have always been under the control of the plaintiffs, and open to fraudulent interpolation. The place of the custody of such insulated memoranda is scanned very closely by many cases. The propriety of this is too obvious to need the support of authority. Besides, not being receivable, as we have seen, in the light of general book accounts of the party, nor, on the same ground, as the entries of large and indifferent commercial houses employing many clerks, but coming in and claiming credit upon the footing of simple original entries, it should have appeared that every source of primary evidence had been exhausted. All those who made the entries should have been produced, or it should have been shown that they were dead. Neither appears to have been done. As far as our cases have gone, they confine the excuse for the non-production to the death of the witness, though Massachusetts has received permanent insanity as an equivalent: *Union Bank v. Knapp*, 3 Pick. 96 [15 Am. Dec. 181]; and South Carolina a permanent absence from the state: *Elms v. Cheves*, 2 McCord, 350; *Tunno v. Rogers*, 1 Bay, 480.

On the whole, I think the referees in this case exceeded the bounds of the cases which are most liberal and indulgent in the reception of this kind of evidence, and that the report must be set aside on that ground.

Report set aside.

1. *Sinclair v. Stevenson*, 1 Car. & P. 582.

2. 2 Car. & P. 196.

QUANTUM MERUIT ON SPECIAL CONTRACT.—For a general discussion of this subject see the note to *Hayward v. Leonard*, 19 Am. Dec. 268. See also *Britton v. Turner*, 26 Id. 713, and *Van Deusen v. Blum*, 29 Id. 582, and other cases referred to in the notes thereto. The principal case is cited as an authority for the position that, where a party working under a special contract has performed such contract in all respects except as to time of performance, and that particular has been waived by the other party, the former may recover, as on an implied promise, the value of his labor and materials, in *Sharpe v. Johnson*, 41 How. Pr. 404; S. C., 3 Lans. 524; 60 Barb. 148. So where completion of the contract is prevented by the other party: *Doughty v. O'Donnell*, 4 Daly, 61. The case is also cited in *Adams v. Mayor*, 4 Duer, 305, to the point that if a contract contain such special provisions as require an allegation of performance to enable the plaintiff to recover, the proper mode of pleading is to declare on the contract and not on the general counts. It is further cited in *Dillon v. Masterton*, 39 N. Y. Sup. Ct. (7 Jones & Spencer), 136, to the point that where a party to a contract wishes to annul the rights of the other party under the contract, upon the latter's failure to complete it at the day designated, he should give such other party notice, requiring performance within some reasonable time specified, and that in case of non-performance their rights will be deemed abandoned.

BOOKS OF ACCOUNT AND OF ORIGINAL ENTRIES AS EVIDENCE: See the note to *Union Bank v. Knapp*, 15 Am. Dec. 191. See also *People v. Gensung*, 25 Id. 594, and other cases in this series referred to in the note thereto: *North Bank v. Abbot*, Id. 334; *Rhoads v. Gaul*, 27 Id. 277, and *Vicary v. Moore*, Id. 323. As to the use of entries in books of account as memoranda to refresh the memory of a witness, see *Pargond v. Guice*, 25 Id. 202. To the point that original entries or memoranda made in the usual course of business contemporaneously with the transaction are admissible in evidence, where the person who made them is produced, and testifies that he made them and believes them to be correct, though he has forgotten the circumstances, the principal case is recognized as authority in *Van Dyne v. Thayer*, 19 Wend. 167; *People v. Rector*, Id. 579; *Sickles v. Mather*, 20 Id. 75; *Butler v. Benson*, 1 Barb. 536; *Cole v. Jessup*, 9 Id. 401; S. C. in the court of appeals, 10 N. Y. 100; 10 How. Pr. 520; *Morse v. Cloyes*, 11 Barb. 108; *Gould v. Conway*, 59 Id. 361; *Guy v. Mead*, 22 N. Y. 465; *Krom v. Levy*, 3 N. Y. Sup. Ct. (Thomp. & C.) 706; S. C., 47 How. Pr. 102; *Taylor v. Stringer*, 1 Hilt. 381; *Conklin v. Stamler*, 2 Id. 428; S. C., 17 How. Pr. 404; 8 Abb. Pr. 400; *Phelps v. People*, 6 Hun, 445; *McGoldrick v. Wilson's Ex'r*, 18 Id. 444; *Phillips v. Preston*, 5 How. (U. S.) 294. So where the person making the entries is dead: *Arms v. Middleton*, 23 Barb. 573. But if living, he must be produced: *Brewster v. Doane*, 2 Hill, 538. Where the party who made the entry is produced, but knows nothing about its correctness beyond the fact that it is in the book, it is held, in *Peck v. Von Keller*, 15 Hun, 471, citing the principal case, that this is not a sufficient authentication to authorize its admission in evidence. In *Morrow v. Ostrander*, 13 Id. 221, the rule laid down in the principal case on this point is said to be now extended in New York, to entries voluntarily made outside of the routine of business of the party making them. The distinction by Judge Cowen, in *Merrill v. Ithaca etc. R. R. Co.*, between original memoranda and copies of such memoranda, with respect to their admissibility as evidence, and his criticism of the doctrine of Mr. Phillips on that point, are approved in *Halsey v. Sinsebough*, 15 N. Y. 488, per Selden, J.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

CARSON v. BURNETT.

[1 DEVEREUX & BATTLE'S LAW, 546.]

WHERE PART OF A TRACT OF LAND IS COVERED BY TWO DEEDS, if the holder of the better title has possession of another part of his tract, but not of that part covered by both deeds, he has, by legal intendment, actual possession of his whole tract, unless the holder of the other title has an actual possession within the intersecting lines.

BOTH PARTIES CAN NOT BE SEISED OF THE SAME LAND at the same time, under their respective deeds; therefore he who has the title is deemed in possession, since he can have no action against the other for any possession by him.

TRUE OWNER IS PRESUMED BY LAW TO BE IN POSSESSION, unless there be an actual adverse possession in another, of some part of the land of the former; his possession exists in his whole tract until some part thereof be usurped by another, so as to oust him from that part, and there can be no such usurpation but by occupation within the better title.

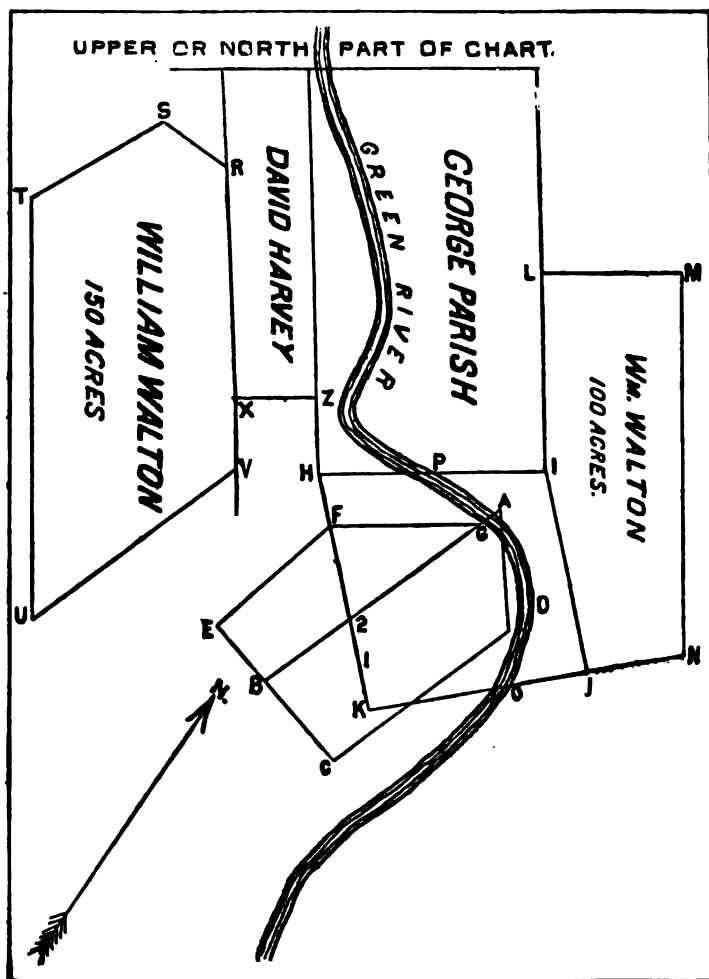
ENTRY BY TRUE OWNER UPON A TRESPASSER so far reinstates the former in his possession as to render his conveyance, sealed and delivered on the land, valid; but this principle does not apply in a case where the two possessions are clearly of different portions of the land, as distinct parcels.

POSSESSION OF PART OF A TRACT OF LAND is in law possession of the whole tract, if there is no adverse possession; but if the land consists of different tracts, each particularly described, in the deed to the person in possession, by its several boundaries, according to the original patent for it, an actual possession upon one of such tracts does not in law extend to the other.

CALL FOR THE LINES OF ANOTHER MAY PREVAIL OVER COURSE AND DISTANCES, when, at the time of the conveyance, such lines were established, known, or reputed to be there; but if the lines were never marked, or there has been no possession according to them, a call for them will be disregarded, and the course and distances must prevail.

PLAINTIFF IN EJECTMENT CAN NOT GIVE EVIDENCE OF OTHER TRESPASSES committed by the landlord himself, who makes himself a defendant to protect the possession of his tenant.

EJECTMENT, tried at Rutherford. To understand the case, a reference to the annexed map will be necessary. The lessor of the plaintiff claimed title under two separate grants: 1. Under a grant to one John Burnett, made in 1767, and represented on the map by the lines H, I, J, K. The defendant claimed



under two grants, one to French, in 1780, represented on the map by the lines A, B, C, D; and the other to Cook, in 1801, represented by the lines G, B, E, F. The lands covered by the two last-named grants were conveyed by separate deeds to one Murray, who, in 1813, conveyed them to the defendant, Mills, under a description which is sufficiently stated in the

opinion. Mills, immediately after his purchase, took possession of the land conveyed by the grant to French, where it interfered with the lines of the grant to Burnett, but not where it interfered with those of the grant to Cook, and continued this possession until 1829, when he leased to the defendant, Lowry Burnett, that part of the land covered by the grant to Cook, which interfered with the grant to John Burnett. Under this lease Burnett entered and committed the trespass for which this action was brought. While Mills was thus in possession, plaintiff's lessor purchased from Burnett's heirs, who had been long out of possession; but he himself was in the actual possession of a small piece of land at A, covered both by the Burnett grant and the French grant, where the latter crossed Green river. His only color of title to this, he held under a grant to William Walton for one hundred acres, indicated on the map by the lines L, M, N, O, P, I. The possession of the lessor of the plaintiff on the south side of the river was confined to the lines H, P, G, F. 2. The lessor of the plaintiff claimed as follows: He produced a grant to William Walton, in 1798, for one hundred and fifty acres, R, S, T, U, V, X, and deduced the title to himself. He proved that, at the date of this grant, Walton owned the land shown on the map as David Harvey's, and that shown as George Parrish's, and he contended that after running the courses of the grant to X, the next course being then "with his own line south, forty degrees east, and with Murray's line two hundred and six poles, to a stake in Murray's line, thence south, six east to the beginning," he must either follow X, Z, H, and thence to the river, and thence down the river to Murray's line at G, and thence go directly to U, the beginning; or he must follow Murray's line, A B, to its termination, and then run to the beginning; or else, running according to the course and distance, he must, from V, run the line of his survey to the nearest point in Murray's line, A B, and then to U, in either of which cases the *locus in quo* would be included in his grant. There were no marked lines on any of Murray's lines except C D. The plaintiff offered to show trespasses by Mills at other points, but as Mills had made himself a party to defend the possession of his lessee, the judge refused to admit the evidence. The instructions given by the court appear from the opinion. There was a verdict for the defendant, and the plaintiff appealed.

Caldwell and Badger, for the plaintiff.

Pearson, for the defendant.

RUFFIN, C. J. Several exceptions are taken to the instructions in this case. Those principally discussed and relied on relate to the opinions expressed by the court on the extent and effect of the defendant's possession. Having refused to give certain instructions prayed for by the defendant's counsel, the court laid it down to the jury, that "when two persons were in possession of parts of their lands, covered by paper titles which lap, neither having any actual possession within the lappage, the law adjudged the possession in him who had the elder title; but where the holder of the elder title was in possession of no part of the land covered by his title, and he who had the younger title was in possession of any part of the land covered thereby, although such possession might not be within the lappage the law adjudged his possession co-extensive with his title, notwithstanding its lappage upon an elder title, of which there was no possession." The materiality of this instruction to the rights of the parties, upon the facts stated in the record, is not perceived. For if the two tracts conveyed by Murray to Mills are to be regarded as one, so that the entry by Mills into either portion is an entry into the other portion of the entire tract, then Mills had made such an entry, within the admission of the plaintiff's counsel, for he was actually possessed of that part of the French patent which the patent to Burnett also covered. If, on the other hand, the two tracts continued several after the conveyance to Mills, then the possession on the one could not embrace the other, unless the other instruction, which will be hereafter noticed, be correct: which would render the one now under consideration unnecessary and immaterial. We might, therefore, be relieved from passing on this, without omitting any duty to the parties. But we conceive the doctrine involved in the instruction to be of such importance as to entitle it to notice; and since the opinion of this court upon one part of it is to be contrary, that we are not at liberty to give to it the sanction of our silence.

To the former of those positions we fully subscribe. If a part of a tract of land be covered by two deeds, and he who has the better title be in possession, not of that, but of another part of his tract, he has, by legal intendment, the actual possession of the whole, unless the other have a possession within the intersecting lines. Why? For the plain reason, that both parties can not, at the same time, be seised of the same land, under their respective deeds; and therefore, he who has the title

is deemed in the exclusive possession, since he can have no action against the other for any possession by him.

The same reason applies with equal force to the case supposed in the latter branch of the instructions; from which this court dissents. The error, as it is esteemed by us, has its root in an assumption of fact, which is not warranted by the law, and is contrary to a legal presumption. It assumes that the true owner is not in possession. Now that can not be, unless another have the actual possession; for, by force of his title, he has constructively the possession until it be destroyed by an adverse possession; and there can be no adverse possession, against which the owner can not have an action to recover the possession. The question is, what sort of possession in another will terminate that which the owner has by construction, so as to enable him to say, that he is out of possession, and to demand it from the other? Certainly, as we think, it must be an actual possession of some part of his land. If the possession be outside the interference, he can not maintain ejectment; for that can be done only by showing a trespass on the premises, described in the declaration, that is, within the boundaries of his own deed. In the case supposed there is no such trespass; for the actual possession of him who is considered the wrong-doer, is admitted not to be within the land of the other. It is not correct to state, therefore, that the owner is out of possession because he is not actually seated on any part of his land. His possession exists in his whole tract, until some part of that be usurped by another, so as to oust him from that part, and there can be no such usurpation but by occupation within the better title. In *Fitzrandolph v. Norman*, N. C. T. R. 132, it is laid down, that "persons owning adjoining tracts of land, which lap upon each other, neither being in the actual possession of the part covered by both conveyances, will be deemed in possession according to the title." Here it will be perceived, that, as being an immaterial circumstance, no notice is taken of possession, on either side, of those parts of the tracts not covered by both deeds. In the recent case of *Green v. Harman*, 4 Dev. 158, the court took the rule as settled, "that if there be two patentees, the entry of the younger on his own land does not oust the other, unless it be on that part of the land covered by both titles."

In *Dobbins v. Stephens*, 1 Dev. & B. L. 5, it was repeated in these words: "If neither claimant be in actual possession of the land covered by both deeds, the seisin is in the owner, but if one

of them be on that part, and the other not, then the possession of the whole interference is in the former." Why? Because he can then be sued for the whole. We find the same doctrine established in other states situated like our own. In Kentucky it was thus held, in *Frimble v. Smith*,¹ 4 Bibb, 257; and in *Smith v. Mitchell*, 1 Marsh. 207.² In *Talbot v. McGavock*, 1 Yerg. 262, the judges of the supreme court of Tennessee admit it to be clearly so at common law, and under our act of 1715; and the majority of the court, in able opinions, maintained it as applicable to a new statute of that state, which enacted that "any person holding seven years' peaceable possession of land under a grant or deed, shall be entitled to hold possession, in preference to all other claimants, of such quantity of land as shall be specified in his or her grant or deed." Notwithstanding these last words, it was adjudged, that a possession of "the disputed land" was meant; and, therefore, that where the part actually occupied is not within the bounds of the elder title, the owner is not barred. Indeed, it would be strange, if the law were against the fact, to construe an entry into part to which the party had right, to be also an entry into another part to which he had no right; a construction the more harsh and unjust, because the sole effect of it is to put out him who has the right, without giving him any remedy therefor.

The court further instructed the jury, that, under the circumstances stated in the exception, Mills was, in 1817, in the adverse possession of the tract granted to Cook, so as to prevent the deed then made by Burnett from passing any title in that tract to the lessor of the plaintiff. To this instruction several objections are taken.

It is urged, first, that the entry of Burnett into any part of the land, covered both by his deed and that to Mills, claiming the whole, vested the possession of the whole in him, and determined the possession of Mills, and that the acceptance of the deed for the whole from Burnett, by the lessor of the plaintiff, then in the occupation of the small piece on the north side of the river, is equivalent to such an entry by Burnett himself. This objection goes much beyond the claim of the plaintiff in the superior court, and, if well founded, would render the deed effectual for the French, as well as the Cook tract, which seems not even to have been contended on the trial. We think, however, that it is not tenable as to either.

Without considering all the purposes to which an entry of

1. *Frimble v. Smith*.

2. 1 Marsh. 270.

the owner into part may inure, or to what extent an entry on a trespasser may determine his possession, the court agrees that such an entry so far reinstates the owner in the possession, as, at the least, to render his conveyance, sealed and delivered, on the land, valid; and that it may be the same, when he conveys to one who is already in possession, as well as the other trespassers, and claiming adversely to him. But this principle can not reach a case in which the two possessions supposed are clearly of different portions of the land, as distinct parcels. The owner may be disseised of one part of the same tract of land by one person, and of another part by another person, each claiming the part in his own possession, and not claiming the other. A recovery from one does not disturb the other; much less will the entry upon one oust the other. Here Carson and Mills had such several possessions of distinct parcels of the French grant. Neither was answerable for the wrong of the other, and the owner might obtain complete redress against one, without seeking any from the other. There was no entry, in fact, upon Mills, and we can not, without going beyond the intentions, at the time, of the parties themselves, say that his possession—as far as it extended—was legally terminated, or suspended by the entry on Carson, or by the deed to him, while in possession of a particular parcel, under a different claim. The only question, then, is, how far Mills' possession legally extended. It was a real *positio fudis* on the French grant, and therefore the lessor of the plaintiff undoubtedly acquired no title to that part, and the instruction is not, upon this objection, erroneous.

We are then brought to the inquiry, whether Mills also had possession of the Cook grant, to which the instruction is by its terms confined. If he had not, the deed to the lessor of the plaintiff passed that, and the plaintiff was entitled to a verdict, and, consequently then, ought to have a new trial. There was no actual possession of it, indeed; no clearing on it by Murray, Mills, or any other person, until Burnett leased from Mills in 1829.

The principle on which his honor proceeded is, that possession of part is the possession of the whole; and here Mills lived on part of the disputed land; that is, on what is covered by both deeds. We think the principle does not reach this case. Upon a reason similar to that on which the preceding objection was deemed invalid, namely, the division of the land into distinct parcels, we think the rule was misapplied to this part of the case. The doctrine, from its nature, can only relate to an entire

thing; a possession of part being a possession of the whole—of what? Of that of which it is a part; and not of that which is separated from it. It is contended, however, that these tracts were united and became one, because the same person owned both, and acquired them by the same conveyance. Neither of these circumstances necessarily tends to such a conclusion, nor do they in conjunction. The law gives possession to the owner of land not occupied by another. But where the title is not derived by a conveyance, but is set up as constituted by possession, it must be an actual and not an ideal possession. Of the same nature must be the possession of a trespasser, to render the deed of the owner inoperative. Now the owner and occupant of a piece of land may purchase another piece, adjoining, and if his title to it be good, he is in possession without more doing. Even in that case the several parcels do not necessarily lose their distinct character, and sink into one whole. They may do so, for many purposes, if the owner so regards them, and a great variety of circumstances may satisfy the mind that his intention was the one way or the other, as giving a general name, or cultivating as one plantation, or the reverse.

But it can not be admitted that they are united for any purpose, by the mere facts of being claimed by the same person, and being adjoining to each other; and much less, that they can thus become united to the prejudice of third persons. The purchase simply, or any declarations of the purchaser, unaccompanied by acts on the land, give no action to the owner, at least none founded on his possession, as continuing, or as being ousted. Burnett could not have brought ejectment against Murray for the Cook land, upon his purchase of it in 1802, for that being the only parcel described in the declaration, the possession of the defendant must be shown to be within that. Although Murray might have given a general name to both, under which both would have passed as one tenement under his will, or by his deed; yet he did not occupy any part of the Cook grant, and, for the reasons before given, was, consequently, not in possession of it, so as to oust Burnett therefrom. Did the deed to Mills produce a new state of things, and make what was not a possession in Murray become a possession in Mills? Ordinarily, not more than one tract is conveyed in the same deed; for if the vendor acquired the estate in several contiguous parcels, when united in him, as to the title or the claim of title, and sold together, they are usually surveyed together, and described as a single tract. Hence the

purchaser, in possession of any part of the land conveyed by that deed, is said to be in possession of the whole, and according to his deed, for the deed professes to pass but one thing. But to make them one whole, by force of a conveyance of them to the same person, and by the same instrument, the change of character ought explicitly to appear in the conveyance. He who actually succeeds to nothing more than the actual possession of his predecessor, ought not to require, presumptively, a larger actual possession, unless it be clear on the deed, that he did not take the estates as the other had them, and, therefore, did not hold them as he held them. If the description be not by a common name, or by lines going around both, but be of each tract as of a separate parcel, not stating even that they adjoin, the idea of undivided unity is excluded.

Such, we think, is the character of the deed set out in the exception. Upon the most favorable construction for the defendants, it is but equivocal. It purports to convey all the "tract or tracts, pieces or parcels of land lying on the south side of Green river, included in two surveys, to wit: the first tract containing one hundred acres, beginning, etc., and granted to S. French, on the twenty-fifth day of March, 1780: also one other fifty-acre tract, beginning, etc., and granted to B. Cook, on the eighteenth day of November, 1801; the above tracts supposed to include by estimation, one hundred and fifty acres, more or less; which said pieces or parcels of land, he, the said P. Murray, doth hereby bargain and sell unto the said John Mills, and his heirs." The only word on which a plausible argument for the entirety of the land can be founded, is "tract" in the beginning. But the effect of that is neutralized by those immediately succeeding, "or tracts, pieces, or parcels." These expressions alone might leave it doubtful in what sense the parties understood their contract. If so, it ought not to be taken most favorably for them against third persons. But that doubt is, in our opinion, removed by what is subsequently stated, and omitted, in the deed. It proceeds to denominate the land as "the first tract," and as "also one other tract;" and particularly describes each by its several boundaries, according to the patent for it, and in the *habendum* clause again calls them tracts, pieces, parcels, and omits the fact of their contiguity. There is, then, nothing in the deed common to both, but the consideration and the warranty; which may as well be where the two tracts are remote as where they adjoin. If they were, in fact, remote, the propriety of this qualification of the

rule, that possession of part is the possession of the whole, would be manifest. That shows that the whole meant is that which is according to the deed, a whole. If that be true, it follows, that, although they adjoin, yet, if they be not described as adjoining, so that it might be seen that they were to pass as one entire thing, they must pass as distinct parcels, according to their respective boundaries; and the possession of one can not be the possession of the other; for that would not be according to the deed. Mills was not more liable to the action of Burnett, in respect of the Cook tract, merely upon his purchase and his entry into the French tract, than Murray was upon his purchase of the Cook tract, and previous and continuing occupation of the other. In other words, the possession of one tract of land, as such, is not the possession of another tract, although they happen to adjoin. There must be an actual occupation of some part of each, to oust their respective owners.

Upon the construction of the patent to Walton, the opinion of the court is against the plaintiff. We do not understand the judge as laying down a general position, that the call for another's line is to be disregarded, if it had not been marked and was to be ascertained by running the course and distance from a given point. We can not so understand him, for if that point be known the line must be certain. We take the language with the context, and with a reference to the case before the court; and, so considered, we concur in opinion with his honor. The object in all boundary questions is to find some certain evidence of what particular land was surveyed, or was intended to be conveyed. Course and distance approach very nearly to permanent certainty if any one of the *termini* be identified, and that is the usual description. But there may be a defect in the instrument, so as to run the line inaccurately; or there may be a mistake in setting down the course and distance. If, therefore, other things be called for, as to which there is less probability of error, they shall control the other calls. Such is the case where the call is for a natural boundary, with respect to which there is but little fear of mistake at the time of the survey, and but little difficulty in identifying it at a subsequent period. But even in that case, evidence may show which is, for instance, the stream called for, or which the parties took to be that which they have given the name; though the necessity for such evidence seldom arises, because parties can not readily fall into such mistakes. When

the call is for the line of another, it has also been held that course and distance may yield to it. But it is, obviously, not so decisive as the call for a natural boundary; and the mind may be under a perfect conviction, from other circumstances, that the mistake is not in the course and distance, but in supposing that the other had a line at the end of the course and distance. If that conviction exists, there ought to be no deviation from course and distance.

Such, it seems to us, is the case here. If, for instance, the line be proved, satisfactorily to the jury, to be at a particular place, and they can collect that at the time of the conveyance, in which it is called for, it was an established line, known or reputed to be there, which is to be presumed *prima facie*, then it affords a ground for the further presumption that the parties meant to go to it. So, if the call be for a particular identified corner of the tract. Thus we understand the rule, as laid down by Chief Justice Taylor in *Cherry v. Slade*, 3 Murph. 90. But if the jury be satisfied that, at the time of the survey, there was no known line, and that it was understood by the parties to be at a different place from what it turns out to be, we think they must abide by the course and distance. As evidence upon these points, that is, whether there was a known line, and which is the line meant or understood by the parties, the facts that the line was marked or unmarked, that the corners were or were not previously identified, that the owner claimed up to a particular line as his, or that there was no previous claim or reputation, are most material. If the jury believed upon all these points, in the negative, then such a line, although it can now be ascertained mathematically, ought not to conclude; because it does not furnish as probable and rational data, for the ascertainment of the actual location, as the course and distance. It would be appealing from evidence, certain to a common intent, to a thing altogether unknown to the parties at the time. This, we take it, was the meaning of the charge to the jury; and we deem it proper in the particular case. Only the first line of the French tract was marked, and the other four were open, and there was no evidence that any one of the four was known, even by reputation, or that any person lived on the land or claimed to any particular points. The line called for, if it be that now ascertained, can not be reached in any one of the methods claimed by the plaintiff, without adding greatly to his quantity of land, inserting another line in his survey and patent, and including a large portion of the land

previously granted to Cook. These circumstances afford almost conclusive proof that this was not the line called for, and that the parties believed that Murray owned the land between Cook and Walton, as laid down in the plot, and that his line began at the termination of that of the Harvey patent and pursued the same course. If so, the call ought not to overrule the other calls, which are certain in themselves.

The court is also of opinion, that the plaintiff could not give evidence of other trespasses of the landlord himself. He did not become sole defendant, as claiming title to all the land mentioned in the plaintiff's declaration; of a great part of which, indeed, the lessor of the plaintiff was, himself, in possession. But he united with Burnett in his defense; that is, to show that the plaintiff had no title to the land in Burnett's possession. It might not be necessary in such a case to prove Burnett in possession of any particular place as against the landlord; who admits him to be in possession as his tenant, by engaging to defend him. But it would be a surprise, if he were called on to defend for other portions of the land; which the plaintiff's own evidence would show had not been in Burnett's possession. This case is, in this respect, nearly the converse of that of *Gorham v. Mooring*, 2 Dev. 174.

But for the errors on the other points, the judgment must be reversed, and a *venire de novo* awarded.

By Court. Judgment reversed.

Cited in *Belfour v. Davis*, 4 Dev. & B. 306, to the point that a landlord who comes in to defend the possession of his tenant, stands in the place of the latter, and is entitled to his rights, and subject to his disadvantages; in *Bynum v. Carter*, 4 Ired. 313; *Smith v. Ingram*, 7 Id. 178; *Williams v. Miller*, Id. 188; and in *Brown v. Potter*, Busb. 463, to the point that where two paper titles cover the same land, and neither party has actual possession of the disputed land, the holder of the better title has constructive possession thereof, but if one of the parties has actual possession of the interference, his possession ousts the other; in *Cohon v. Simmons*, 7 Ired. 191, to the point that the law which carries the possession to the title, carries it to the real title; in *McDowell v. Love*, 8 Id. 504, to the point that it is not necessary to prove a tenant to be in possession of any particular place as against the landlord, who admits him to be in possession as his tenant, by engaging to defend him; in *King v. Brittain*, 10 Id. 118; and in *Atwell v. McLure*, 4 Jones, 377, as holding that plaintiff could not give evidence of a trespass by the defendant, the landlord, at a place not in his tenant's possession; in *Leftin v. Cobb*, 1 Id. 409, to the point that possession of several tracts of land separate, and separately described in the conveyance, does not constitute possession of each; distinguished in *Morris v. Hayes*, 2 Id. 95.

CALL FOR LINE OF ANOTHER'S GRANT will be disregarded, and the course and distance pursued, where such line is not marked, or ascertained by evi-

dence: See *Gause v. Perkins*, 2 Jones, 226; and *Mason v. McCormick*, 75 N. C. 266, citing the principal case.

POSSESSION OF PART OF A TRACT is possession of the whole, when there is no adverse possession thereof: See *Wallace v. Maxwell*, 7 Ired. 137, and *Le-noir v. Smith*, 10 Id. 241; also *Hammond v. Ridgely*, 9 Am. Dec. 522, and *Kennebeck Purchase v. Springer*, 3 Id. 227 and note 230.

LINE OF ANOTHER TRACT, WHICH IS PROVED, is to be followed in preference to mere call for course and distance: *Campbell v. Branch*, 4 Jones, 314, citing the principal case. See also *Bradford v. Hill*, 1 Am. Dec. 546 and note 548.

SKINNER v. MOORE.

[2 DEVEREUX & BATTLE'S LAW, 138.]

JUDGMENTS RENDERED IN SUITS BY ATTACHMENT have in this state the same operation and effect as those rendered by the same courts in other actions.

JUDGMENT OF COURT HAVING JURISDICTION OF THE SUBJECT-MATTER, and proceeding according to the course of the common law, is conclusive until set aside or reversed, and can not be impeached collaterally.

COUNTY COURTS ARE, IN THIS STATE, COURTS OF GENERAL JURISDICTION, and their judgments are entitled to the faith and credit of record evidence, when the cause of action is within their jurisdiction, and the person or thing necessary to constitute a cause in court is found and taken within the county.

JUDGMENT IN ATTACHMENT SUIT HAS, BY THE LAW OF THIS STATE, THE SAME EFFECT as if the process had been personally served. Such judgment is in fact not *in rem*, but personal.

DISTRESS OF DEBTOR'S PROPERTY IS INDISPENSABLE IN ATTACHMENT SUITS, in order to constitute the cause in court; and unless that appears from the record, the proceeding is *ex parte*, and not binding upon the debtor.

EVIDENCE DEHORS THE RECORD IS NOT ADMISSIBLE in such a suit to prove that the estate attached was not the property of the defendant.

NEGOTIABLE SECURITIES MAY BE ATTACHED as "money due to the defendant" in the attachment.

DEFECTS IN THE AFFIDAVIT DO NOT RENDER THE JUDGMENT VOID, but are, at most, error only.

TO ENTER JUDGMENT FOR A LARGER SUM THAN THE DEBT SWORN TO, and named in the attachment, is error for the excess only.

EJECTMENT for a house and lot in Edenton. The lessor of the plaintiff, after showing that the premises in question had formerly belonged to one James R. Creecy, produced a copy of the record of a judgment obtained against said Creecy in the county court of Perquimons county, in favor of himself. He further showed an execution on said judgment, a sale by the sheriff, and a sheriff's deed to himself as purchaser. The record of the judgment showed that it was founded on an original attachment, issued by a justice of the peace of said county, on an

affidavit of the plaintiff stating "that James R. Creecy is justly indebted to him in the sum of two thousand two hundred and forty-eight dollars sixty cents, due by promissory note; that the said James R. Creecy hath so removed himself out of the county or so absconds or conceals himself, that the ordinary process of the law can not be served on him." The sheriff returned the attachment with an indorsement that he had levied it upon money in the hands of J. C. Skinner, due by note from him to Creecy, and that he had summoned Skinner as garnishee according to law. Upon the return of the attachment the garnishee filed a garnishment, in which he stated, among other things, that the promissory note was payable to one Tredwell, and had been paid over to Creecy, but whether assigned or indorsed by the payee or not, the affiant knew not; that about two days before Creecy left Edenton he promised affiant that he would surrender the note to said J. C. Skinner for the benefit of this affiant, but the affiant knew not where the note then was, nor what Creecy afterwards did with it. At the return of the attachment, judgment by default was entered, and an order made for publication for two months. At the next term the court condemned the property attached and rendered a final judgment against Creecy, and also against the garnishee for the sum due on the note. On the judgment against Creecy, execution issued, upon which the house and lot in question were sold, and the plaintiff became the purchaser. It appeared from the evidence that Creecy was not, at the time when he left the state, an inhabitant of Perquimons county, but a resident of Edenton in the county of Chowan. The other facts sufficiently appear from the opinion.

Badger, for the lessor of the plaintiff.

Iredell and Devereux, for the defendant.

RUFFIN, C. J. The particular ground on which his honor held the judgment in the suit by attachment to be void, and that the lessor of the plaintiff derived no title by his purchase at the execution sale, is, that Creecy, as shown by evidence, had not lived in Perquimons, but was a resident of Chowan for several years before, and up to the time at which he absconded; and that the plaintiff, in that suit, stands affected by every irregularity in the process, and the subsequent proceedings thereon. The record, however, states other exceptions taken by the defendant to the validity of that judgment, and his counsel here have relied on several of them, and urged as a

general proposition, that attachments are not known to the common law, and are in derogation of the common right of every person who is to be affected by judicial proceedings to have personal notice, and the opportunity of making a full defense; and, therefore, that a proceeding by attachment is not valid to any purpose, unless the directions of the statutes be in all respects observed.

The court is not insensible to the injustice that may be done, and, we believe, is frequently done here and in other states, and especially to non-residents, in suits commenced by this process; by which the seizure of a trifling article founds a case for the recovery of a large demand; but we think, that we are now obliged to hold, that such judgments rendered in this state have the same operation and effect here, as those rendered by the same courts in other actions have.

The whole argument on the part of the defendant has been met *in limine* by an objection from the other side, that if the judgment be void, it can be avoided only by the defendant therein; and that it can not be deemed so entirely null, that the present defendant, without showing any connection between him and Creecy, can allege it. This position is not without force, nor entirely destitute of authority. If Creecy, knowing the debt to be just, submits to the sale of his property under it, a mere wrong-doer, one having no color of right, ought not to gain the possession, and defy the purchaser. If it be not so absolutely nugatory, that Skinner can treat his judgment as null, and, saying that his original cause of action is not merged in it, bring a new action thereon, it would seem that third persons ought not to set the judgment at naught. We know that in England the slightest steps are fatal to outlawries, and they are reversed upon objections in which there is neither sense nor reason, as Mr. Justice Buller said in *Rex v. Almon*, 5 T. R. 202. Indeed, those on mesne civil process are set aside, of course, upon the party's appearing and putting in bail, as in our attachments—both being designed to compel an appearance. Yet in *Symonds v. Parmiler*, 1 W. Bl. 20, where process was sued against two on a joint contract, and one of them was prosecuted to outlawry, and the plaintiff declared against the other alone, the latter was not allowed to plead the illegality of the outlawry, and insist thereon that the plaintiff could not come against him alone: for, said Lee, C. J., it is not void, but voidable at the instance of the party himself, and a stranger shall not demand of the court to pronounce the outlawry null.

But, as upon another trial the defendant might show some interest in himself, and in that event this point would not be decisive of the rights of the parties, the court has considered the others made in the argument.

The general rule has not been questioned by the defendant's counsel, that the judgment of a court having jurisdiction of the subject-matter, and proceeding, according to the course of the common law, by declaration, plea, issue, trial by jury, and judgment of record, can not be collaterally impeached, but until it be set aside by the same court, or reversed in a superior tribunal, is conclusive. Such is, unquestionably, the general rule of law. The reason is, that the judgment itself is evidence of the right determined in it, or debt recovered; and is evidence so high, that the denial of the right can only be made in the form of a plea denying the existence of the record alleged. The principle applies to all courts to which a writ of error runs from a higher court, or from which an appeal lies to a higher court, which itself proceeds according to the common law; because these are adequate remedies for any error. As to inferior tribunals, or those having a special and peculiar jurisdiction, it is otherwise. Their improper acts may in some instances, be restrained in their progress, by prohibitory writs from the court of general superintending powers; or in others, may be corrected by having their proceedings brought up by certiorari and quashed; and, in yet others, may be questioned by plea. But we are not aware of any instance in which the subject-matter is within the jurisdiction, and a cause is once constituted in a court of record, that the judgment is not conclusive between the parties, or any other plea is admissible, except *nul tiel record*; and that without regard to the process by which the action was commenced.

The judgment here is for a certain sum of money; and to raise the same the premises in dispute were sold under execution. Had the court power to pronounce such a judgment in any case; and had it jurisdiction of the cause of action in this case? It is insisted, that the county court of Perquimons had not jurisdiction, because Creecy had not resided there, and the authority to a justice of the peace to issue an attachment is restricted to one against the estate of a person absconding from his own county. By the twenty-fifth and twenty-seventh sections of the act of 1777 (Rev. Code, 115), provision is made relative to attachments in the superior courts. Any justice of the peace is authorized to issue them, as well as the judge of the superior

court, returnable to the court where the suit is cognizable; which must mean such of the courts as would, according to other parts of the act, have jurisdiction over the persons, if the process had been personally served—in which last case, the defendant has a plea in abatement, if neither he nor the plaintiff live in the district. The sixty-fifth section is that which provides for suits by attachments to the county court; and it authorizes every justice of the peace of the county courts, upon complaint made for any debt or damage cognizable in the county courts of pleas and quarter sessions in this state, to grant an attachment against the estate of any person removing out of the county privately, returnable to the court of such county, observing the rules appointed for those returnable to the superior courts.

We agree in the observation of Chief Justice Taylor, in the *State Bank v. Hinton and Brame*, 1 Dev. 397, that there is no law in the statute book which more imperiously demands a strict construction, than the attachment law; and very trivial objections to the process and to the jurisdiction, as to the persons, and the like, are to be listened to, if brought forward at the proper time. We also entertain no doubt, that the court of "such county," to which the writ is to be made returnable according to the sixty-fifth section, is "the county" of the justice, and "the county" out of which the debtor has removed or is removing privately; and if the case rested at the process, and the question concerned its regularity, it would, we think, be against the plaintiff; but it does not. The question now concerns the effect of the judgment for the debt—that "debt being cognizable in the county courts of this state." As we conceive, the jurisdiction of suits by attachment is not specially delegated to a particular court in a particular case, and in that only; but that process is given instead of the *capias* to all courts, to enable them to exercise their jurisdiction over the subject-matters generally which are within their jurisdiction. The subject of this suit is a debt, and is within the jurisdiction of the county courts. By the acts of 1777 (Rev. Code, 115, sec. 56), and 1785 (Rev. Code, 233), the county courts are made courts of record, with general jurisdiction to try and determine actions of debt and all causes whatsoever at the common law, with certain specified exceptions. The jurisdiction is not limited to causes of action arising in the county. But they can not issue original process, running out of their own county, though subpoenas and final process from them may run into any part of the state.

The restriction upon their process seems necessarily to limit their jurisdiction to cases in which the original process is served in their county, but that seems to be the only restriction upon their jurisdiction. As to the subject-matter, it is as extensive as it can be. When, therefore, the person or the thing, which it is necessary to have before the court in order to constitute a cause in court, is found and taken within the county, the cause is then constituted; and if the matter be within the cognizance of the court, the judgment rendered thereon is entitled to the faith and credit of record evidence.

Its efficacy can not be impugned by the allegation that another court had concurrent jurisdiction of the subject-matter, and that the defendant had a right to have the cause tried in such other court. That is not an objection of the total want of jurisdiction; which every court must take notice of, because that renders any adjudication null; but it is an objection to the exercise of the jurisdiction between the particular parties, upon the ground of a provision in the law for their convenience, and is therefore to be brought to the notice of the court by putting the fact on the record by plea. The distinction is between the entire want of jurisdiction, which no consent of the parties can confer, and a general jurisdiction, except in particular cases, or between particular persons, in which the exception must appear upon objection made. A familiar example is furnished in the clauses of the act of 1777, which prescribe in what superior courts suit shall be brought; but if brought otherwise, advantage can only be taken by plea in abatement. So, in the case before us—all county courts have, by one general provision, jurisdiction of debts at common law. That is not cut down to a special jurisdiction by another particular provision giving jurisdiction of debts in a certain case to a particular court; for in each court the trial is in the same mode, the right determined upon the same rule as to the law, and as to the nature and extent of the proof. Such a provision is therefore merely for the ease of the party; and consequently must be availed of either in the progress of the cause, or perhaps, in some cases, by way of reversal, and not by averment of the excess of jurisdiction. In the particular case before us, although the affidavit does not, the attachment itself purports to state that Creecy had absconded from Perquimons county; and it would be exceedingly difficult to find a ground upon which the record can be contradicted as to that fact by evidence *in pais*. But the other is a sufficient answer, namely, that the

cause of action was within the jurisdiction of the court, and there was no objection from the defendant.

It is said, however, that in this respect attachments differ from other suits; because the defendant is not served with process, and may not appear, and when he does not appear, can not be considered as waiving anything. The argument may be properly urged for reversing a judgment in attachment for errors the party is deemed to have waived by appearing, and pleading in bar, or to be cured by having a verdict found against him. It is also forcible against the policy of giving efficacy to an adjudication rendered in the party's absence, and without notice; or at all events beyond the condemnation of the thing attached. The mischief is in giving full effect to such a judgment, how regular soever may have been the observance of the rules for prosecuting the suit, rather than in allowing it when some of those rules, as to the manner of proceeding, may have been overlooked. But if the legislature thinks it proper to enact that such a judgment shall have the operation of judgments in actions commenced by original process personally served, the statute is to be quarreled with, but not the court for giving credence to the record. Such, we think, is our statute law. The judgment is not *in rem*, but personal. The act goes on the idea that seizing property and advertisement would give notice, and therefore they are made to constitute notice. Consequently, if the party will not or does not appear, it is treated as his default; and judgment is entered against him personally.

By the twenty-third section of the court law, judicial attachments in the superior courts are given; and it is provided that the goods attached, unless replevied, shall remain in the custody of the sheriff until final judgment, and then be disposed of in the same manner as goods taken in execution on a writ of *fiery facias*; and that if the judgment be not satisfied by the sale of the goods attached, the plaintiff may have execution for the residue. The twenty-fifth section gives original attachments in the same courts, and the same proceedings are directed to be had thereon as on judicial attachments. Among the rules prescribed for the county courts by the seventy-third section, the declaration is to be served on the defendant or his attorney five days before court, and filed on the first day of the term, or at the calling of the cause. The service of it is dispensed with in the seventy-first section in judicial attachments, thereby given in the county courts "to enforce appearance," and it is provided, that if the sheriff shall return the

writ executed, the plaintiff shall file his declaration according to the rules of the court, and proceed as in other cases. By the sixty-fifth section original attachments are likewise given in the county courts for any debt, or damage cognizable therein, and the like judgment, remedy, relief, and proceedings shall be had thereupon, as in like cases are grantable in the superior court. This language is explicit, that he who sues by attachment is to declare for his debt as at common law, and to recover a judgment, not against the thing, but against the defendant, also as at common law. Accordingly, it has been held, that the plaintiff is not restricted to a judgment of condemnation and a *venditioni exponas*, but may issue a *feri facias* against the estate generally of the defendant: *Amyett v. Backhouse*, 3 Murph. 63. *English v. Reynolds*, N. C. T. R. 92, was an action of debt for a balance due on such a judgment after a sale of the property attached, and the question was made, whether the record was evidence, and if so, whether it was *prima facie* or conclusive; and the court held it to be conclusive; in other words, that *nul tiel record* was the only plea.

In the cases, yet nearer to the passing of the act, of *Haughton v. Allen*, Conf. 157, and *Bickerstaff v. Dellinger*, Id. 299, it was laid down, that our attachments were not like those founded on the local custom of London, but were governed by our own statutes as general laws, and that the judgments in them were to be reviewed by writ of error, as the judgments of courts proceeding according to the course of the common law. More recently, in *Swaim v. Fentress*, 4 Dev. 601, upon a certiorari the superior court had superseded the judgment of the county court in an attachment as being void for certain errors and irregularities; but this court reversed the decision, upon the ground, amongst others, that the record could only be brought up to be examined upon the matter of law by writ of error, and that it could not be quashed. We then thought that we were obliged to look at the judgment, as that of a court of record, proceeding according to the course of the common law. In fine, to impeach it, by plea or evidence, when the defendant has either appeared, or when the cause has been constituted in court, as contemplated in the act, by a seizure of property and notice, instead of a *capias* or personal summons, could be allowed only upon the ground, that the legislature have not the power of dispensing with the personal service of process, and that the act is unconstitutional; a position not taken at the bar,

and in view of the statute books of the American states, it can not be supposed that it will be taken.

It has been further insisted, that the judgment is a nullity, because the attachment was not served on the property of Creecy. If such be the fact, and it can be seen on the record, the court has no hesitation in expressing an assent to the conclusion. It is of the substance of the justice due to a defendant, that he should have notice of the action. So much is held out to him in this statute. But a *distringas* can not give the notice, unless a distress be made; and therefore it is essential, in whatever court the suit be brought, whether it be one of universal, as well as one of the most limited jurisdiction; for the question is not, whether there be a judge, but whether there are allegations between these parties, on which there can be an adjudication. A record is not evidence, except of its own existence, between any persons but those who are parties to the proceeding stated in it, or their privies. If the proceeding be not *in rem*, and there be no parties, there can be no adjudication; and it can appear that persons were made parties, only when the record states their appearance in court, or the official service of the process of the court. This seems to be a first principle, not needing the support of an authority, but it is stated in *Pearson v. Nesbit*, 1 Dev. 315 [17 Am. Dec. 569], *Armstrong v. Harshaw*, Id. 187, and *White v. Albertson*, 3 Id. 341.¹ As applied to attachments, it renders indispensable a distress of the debtor's property, in order to constitute the cause in court; and unless that appear of record, the proceeding is *ex parte*, and not binding on the debtor. In *Amyett v. Backhouse*, it is said, that the only effect of issuing the attachment, and having it levied, is to give the court jurisdiction, whereby judgment may be obtained. There is, perhaps, an inaccuracy in the use of the term jurisdiction, for the defect is, that the court has no person or cause before it. But the inaccuracy is no wise material to the present inquiry.

In *Haughton v. Allen* it was held that a garnishee was entitled to a writ of error on the judgment against him, although the effect might be to reverse, or reduce to a nullity the judgment against the defendant in the attachment; and it was further held that such would be the consequence if the attachment was served only in the hands of the garnishee. The two judgments were considered as so connected, that one could not exist without the other; for unless the plaintiff find property in the hands

of the garnishee, he can not have judgment against the defendant; and if the judgment against the garnishee be reversed, there is nothing then to support the principal judgment, which must fall of course, each part being essentially necessary to the other. In *Armstrong v. Harshaw*, several attachments were served on a parcel of corn supposed to belong to Harshaw; and upon a sale of it, by order of the court, it did not produce enough money to satisfy the prior attachments; and there was nothing left applicable to the plaintiff's demand; yet the plaintiff proceeded afterwards in his suit, and took judgment, and then brought an action of debt on it in this state. It was adjudged against the plaintiff upon *nul tiel record* upon the ground that there could be no judgment against the defendant, as he was not a party to the proceeding. Indeed, it is probable that the proviso to the thirtieth section of the act, which forbids judicial process (including, of course, final process, as well as that issued pending the suit) to be issued, unless grounded on an original attachment, or unless the leading process be executed on the defendant when in the state, has this point in its purview. It is clearly intended that there should be service of the writ, on the person or the property; and therefore we think the judgment null, unless the record shows service, either of the one kind or the other, or an appearance.

We are, however, further of opinion, that evidence *dehors* the record, is inadmissible to establish, as a fact, that the estate attached was not the property of the defendant. Such evidence is not relevant to the only issue that can be joined in an action on the judgment, namely, *nul tiel record*. If addressed to the jury, it would contradict the record, when that shows that the court had found and condemned the thing, as the property of the defendant; which interlocutory judgment is as much between the parties, and as conclusive, while it stands, as that finally rendered for the debt. The service on the property, as stated in the record, stands on the same ground as appearance or personal service of process, therein appearing, against which no averment can be made collaterally. A mistake of the court in either respect, is error of judgment, as to the fact or the law; and like other errors of a like kind, it must be investigated and corrected, directly, and not incidentally. If the record show that there was a distress of a particular thing, and that it was not the property of the defendant, or was legally applied to satisfy other persons, so that no part thereof could be, or was condemned to the use of the plaintiff,

or that the garnishee declared that he had no estate of the defendant, and was not indebted to him, and yet the court thereupon should give a judgment against the defendant, it would be void, because there was nothing before the court on which it could act. It has been contended that such is the case before us. The garnishee declared, at August term, 1829, that he was indebted to Creecy in the sum of two hundred and twelve dollars; and at the next term, the court condemned that sum to answer the plaintiff's recovery. In a subsequent part of the garnishment, it is stated, that the debt was due by bond or note, not payable to Creecy, but to another person, and it is expressly left uncertain whether it had been indorsed to him or not, and whether or not it had been indorsed by him; though it appears that he was the holder of the note, and claimed it, and had promised to pass it to the plaintiff, in part of his debt. Upon this state of facts, several objections have been taken by the defendant.

It is first said, that supposing the note to have been assigned to Creecy, it is a negotiable instrument, and for that reason, the debt is not the subject of attachment, and therefore Creecy was not in court. Attachments, upon their face, run against "the estate" of the defendant; but the twentieth section of the act provides, that they may be served in the hands of a person supposed to be "indebted" to the defendant, and that such person shall declare on oath, what he or any other person, to his knowledge, is indebted; and this, by the act of 1794 (Rev. Code, 424), is extended to debts payable at a future day; and the court, upon the appearance and examination of the garnishee, is required to enter up judgment, and award execution against him, "for all sums of money due to the defendant from him." These terms embrace every debt, whether due by bond or otherwise; and in practice, those due upon negotiable securities have been attached as well as others. If the instrument was assigned before process of attachment sued, and the garnishee, in ignorance of it, confess the debt in his garnishment, what is to be the effect as between the garnishee and the assignee, has not, we believe, been as yet decided; nor, in case the assignee's right is to be preferred, whether the garnishee and the defendant, or either of them, may not, by some legal proceeding, and what, put the fact of the previous assignment on the record, so as to protect the garnishee from a double payment, and reverse the judgment against the defendant, by reason that none of his effects were, in truth, distrained. We give no opinion

upon those questions, because they do not concern the present case. Here no assignment by Creecy appears in the record; and if the note had been indorsed to him, the debt, legally as well as equitably, belonged to him, and was therefore the subject of attachment.

It is next said, that no indorsement to Creecy appears, and therefore he could have no legal interest, which alone is liable to attachment. It might, perhaps, be a sufficient answer to this, to say, that everything consistent with the express declarations in other parts of the garnishment, is to be presumed, to support the judgment, on the distinct acknowledgment in the beginning of it, of a debt from the garnishee to Creecy; and therefore, although the note may not have been indorsed, that the garnishee had expressly promised Creecy to pay him, as the holder and equitable owner of the note—especially as it appears, that the note, and the payment of it, had been the subject of arrangement between them. But a clear answer to it, as an objection in this cause, consists, as we suppose, in the judgment of condemnation in the record; which operates like other judgments, until it shall be reversed at the instance of Creecy, or the garnishee.

The same is likewise true of the other objection, that the debt attached was entered as a credit on the note sued on. It has this memorandum at the foot of it: "Jo. C. Skinner's note to be deducted;" and the garnishee deposed that Creecy promised him that he would pass his note to the plaintiff. The court nevertheless condemned the debt as the property of Creecy; and that judgment remains in full force—which compels us to regard it in like manner. We may, however, observe upon this part of the case, that nothing appears that induces us to think the judgment erroneous. The memorandum does not identify the debt, and is not in the nature of a credit or entry of payment which would have specified the sum. It is rather evidence of an executory agreement or understanding, that the creditor should or would take J. C. S.'s note in part payment.

Having thus disposed of the principal objections, it seems scarcely necessary to go through the others particularly. The third, fifth, and sixth exceptions were given up, as not amounting to error or irregularity. The defects in the affidavit could at most, be error only; and perhaps not that, since the total want of the affidavit is matter of abatement by the twenty-sixth section of the act. That the judgment is for a larger sum than

the debt sworn to, and mentioned in the attachment, is error for the excess only: *Dowd v. Seawell*, 3 Dev. 185.

But it has been further contended, and of that opinion was his honor, that although a stranger purchasing at the sale might not be, yet the plaintiff in attachment is affected by any irregularity in suing out the writ, or in any of the subsequent proceedings; and that the court may look into them to see if they have been according to law. We think this is a misapplication of a doctrine which is sound in itself, when properly understood. It is true that the party is responsible for suing out irregular process, whether mesne or final; that being the act of the party himself. If a plaintiff sue out a *capias ad respondendum* not returnable to the next succeeding term, it is irregular and void, because the defendant may thereupon be imprisoned a long time before he can make his defense. In such a case, trespass will lie: *Parsons v. Loyd*, 3 Wils. 341. But it does not follow that a judgment for the demand claimed in the writ is also void, and that the plaintiff could not purchase at a sale made by the sheriff under it. The contrary is the law. The judgment is the act of the court and not of the party; and is a sufficient authority for what is regularly—that is, according to the course of the court—done under it. It may be, that here Creecy was entitled to his action against the plaintiff, and also against the justice of the peace, for issuing the writ and attaching his property in a county in which he had never lived, and that for the same reason, the judgment of the court is erroneous. Yet it can not be deemed void, unless every erroneous judgment is to be thus treated. So too, the plaintiff is liable to the action of the defendant for suing out an execution not warranted by the judgment; as a *ca. sa.* on a judgment against an executor *de bonis testatoris*: *Baker v. Braham*, Id. 368. Or a *fi. fa.* for a larger sum than that for which the judgment was rendered: *Coltraine v. McCain*, 3 Dev. 308 [24 Am. Dec. 256]. And if execution issue after a year and a day, the plaintiff can not acquire a title, though a stranger may, and the sheriff be justified: *Oxley v. Mizle*, 3 Murph. 250; *Weaver v. Cryer*, 1 Dev. 337.

But here is no irregularity in the execution. The judgment warranted it, if the judgment itself was not void. Now, it is likewise true, that an irregular judgment does not justify the plaintiff in any of the acts done under it, provided it be set aside, although it does the officer; and a stranger gets a good title even if it be set aside: *Turner v. Felgate*, 1 Lev. 95; *Barker*

v. *Norwood*, 3 Wils. 376. It is the same as to the party, when set aside, as if it had never been: *Philips v. Biron*, 1 Str. 509; *Bender v. Askew*, 3 Dev. 149. But it remains to be ascertained, what is an irregular judgment, in the sense we are speaking of. It is not irregular, because it is erroneous. Error does not constitute irregularity; nor does it necessarily enter into it: an irregular judgment is one entered contrary to the course, the practice of the court; as out of term time; by default, before the proper period of the term; or without service of the process; upon a forged or extorted warrant of attorney; or the like. If it appear upon the record entirely free from error, yet the court by which it purports to have been pronounced, may set it aside for the irregularity; but no other court can, unless in an appellate capacity: *Bender v. Askew*, *supra*; *Reid v. Kelly*, 1 Dev. 313, and the cases there cited. This doctrine has therefore no application to this case, unless judgments in attachments are of a different nature, or stand upon a different ground from those in other suits. We have already shown, that when the suit is well constituted by distraining property or summoning a garnishee, the judgment is, in our law, precisely the same as if the process had been personally served. It may be reversed for errors which would not have been sufficient if the party had appeared, or perhaps if the process had been served on the person. But as the judgment is the same in each case, that in attachment, until it be reversed, has the same operation the other has. It can be questioned at law only by writ of error; and other relief can be had only by invoking the aid of that tribunal in which unjust judgments obtained by surprise and without the opportunity of defense at law are relieved against.

The judgment of the superior court must be reversed, and the parties go to trial before another jury.

By COURT. Judgment reversed.

JUDGMENT OF COURT OF COMPETENT JURISDICTION is conclusive until reversed or avoided, and can not be attacked collaterally: See *Cheshire v. McCoy*, 7 Jones, 378, and *Bank v. Spurling*, Id. 403, citing the principal case; also *Roach v. Martin*, 27 Am. Dec. 746; *Estill v. Taul*, 24 Id. 498, note 502; *Den v. Albertson*, 22 Id. 719, note 722; *Fridge v. State*, 20 Id. 463; *Ocean Ins. Co. v. Francis*, 19 Id. 549, note 561, where other cases on this subject are collected.

ATTACHMENT OF PROPERTY, WHAT NECESSARY TO CONSTITUTE: See *Holister v. Goodale*, 21 Am. Dec. 674, note 677; *Naylor v. Dennie*, 19 Id. 319; *Odiorne v. Colley*, 9 Id. 39; *Knap v. Sprague*, 6 Id. 64.

BANK BILLS MAY BE ATTACHED: *Spencer v. Blaisdell*, 17 Id. 412.

The principal case is cited in *Winslow v. Anderson*, 3 Dev. & B. 9, to the point that a judgment taken without service of process, or signed out of term, or by default before the proper time, is an irregular judgment; in *Dick v. McLaurin*, 63 N. C. 186, to the point that an irregular judgment is one entered contrary to the course of practice of the court; in *Woody v. Jordan*, 69 Id. 199, to the point that irregular process, after it has been set aside, is no justification to the plaintiff, or his attorneys and aiders; in *Turner v. Douglass*, 72 Id. 134, to the point that a judgment taken against an infant who appears by attorney, is not irregular or void, but merely erroneous, and valid until reversed; in *Burke v. Elliott*, 4 Ired. 359, to the point that when actual service of process upon the defendant appears from the record, it can not be collaterally questioned; in *Hooks v. Moses*, 8 Id. 90, and in *Grier v. Rhyme*, 67 N. C. 340, to the point that a defendant can not collaterally attack a judgment on the ground that he was not duly served with process, or notified of the time and place of trial; in *Respass v. Pender*, Busb. 79, to the point that a judgment upon a proceeding in an original attachment is placed upon the same footing with a judgment rendered in a court of record proceeding according to the course of the common law; in *Israel v. Ivey*, Ph. 553, to the point that a court may, where a defect of jurisdiction is apparent, on plea, suggestion, motion, or *ex mero motu*, stop the proceeding.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

EDWARDS v. UNIVERSITY.

[1 DEVEREUX & BATTLE'S Eq. 325.]

STATUTE OF LIMITATIONS, BAR OF, IN CASES OF TRUST.—In the case of a trust constituted by the act of the parties, the possession of the trustee is that of the *cestui que trust*, and no length of possession will bar; but the possession of a trustee, made such by the decree of a court of equity, is considered adverse, and, in that case, the statute of limitations will be a bar.

PLAINTIFFS, TO PROVE A DISABILITY WHICH EXEMPTS HIM FROM THE OPERATION of the statute of limitations, must show that it was a continuing disability from the time the cause of action first accrued.

BILL seeking to have the defendants declared trustees of the plaintiffs. The plaintiffs were the children and heirs at law of John Edwards, who was an officer of the North Carolina line in the continental service, during the revolutionary war, and as such, by the laws of the state, entitled to one thousand acres of military bounty land. He died intestate in 1817, without ever having obtained his warrant. The defendants suggested that he had died, leaving no heirs, and obtained a warrant for the land as having escheated to them. Two of the plaintiffs were proved on the trial to be married women, but when they were married, and whether or not they were married at the date of the warrant, and so continued, did not appear either from the pleadings or the proofs. The warrant was obtained in 1821, the bill was filed in 1831, and the defendants relied upon the statute of limitations.

Pearson, for the plaintiffs.

Badger, for the defendants.

DANIEL, J. (after stating the case). The plaintiffs seek to make the defendants their trustees by operation of law, and by a decree of this court. The defendants rely upon the statute of limitations, nearly ten years having elapsed since they obtained the warrant and assigned it, to the time of filing the bill. As respects trusts, the distinction in equity is, that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of possession as such will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud, or the like, his possession is then considered adverse, and the statute of limitations will run, and be a bar: *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633; *Cholmondely v. Clinton*, 1 Turn. & R. 118, 119; 1 Chit. Pr. 759. As to the plaintiffs who were *femes-covert* at the filing of the bill, but who are not shown to have been *covert* when the defendants obtained the warrant and made the assignment, the rule is, that when issue is taken on the plea of the statute of limitations, that the cause of action did accrue within a certain time, the burden of proof lies on the plaintiff, and he must prove a cause of action within the limit: *Hurst v. Parker*, 1 Barn. & Ald. 92; 2 Stark. Ev. 888. When it is incumbent on a plaintiff to prove that he labored under a disability, which exempts him from the operation of the statute of limitations, he must show that it was a continuing disability from the first; for it seems to be a general rule, that where such a statute has once begun to run, no subsequent disability will restrain its progress: 2 Id. 901; 4 T. R. 309;¹ 1 Str. 566.² The cause of action in this case arose in the year 1821; the bill was filed ten years after, viz., in the year 1831; at which latter period two of the plaintiffs were *femes-covert*; but that they were so in the year 1821, there is no proof produced by the plaintiffs on whom the onus lies: the statute of limitations therefore bars the claims of each and all the plaintiffs, and the bill must be dismissed, but without costs.

By COURT. Bill dismissed.

STATUTE OF LIMITATIONS IN CASES OF TRUST.—Statute does not run against *cestui que trust*: *Thomas v. White*, 14 Am. Dec. 56. No lapse of time bars a direct trust as between the trustee and the *cestui que trust*: *Decouche v. Savetier*, 8 Id. 478, note 491. Statute is a bar to implied, but not to express trusts: *Shelby v. Shelby*, 5 Id. 686. The principal case is cited in *Thompson v. Thompson*, 1 Jones, 434, and in *Taylor v. Dawson*, 3 Jones Eq. 91, to the

1. *Doe v. Jones*.

2. *Gray v. Mendes*, 1 Str. 556.

point that if a trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if the trust be created by decree of a court of equity, his possession is adverse, and the statute of limitations will run; and in *McKetham v. Murchison*, 73 N. C. 435, to the point that the time in which an equity raised by the court in regard to land can be barred, in analogy to the statute of limitations, is seven years.

BRILEY v. SUGG.

[1 DEVEREUX AND BATTLE'S Eq. 366.]

SURETY WHO PAYS JUDGMENT OBTAINED AGAINST HIMSELF AND HIS PRINCIPAL thereby satisfies it, and reduces himself to the situation of a simple contract creditor of such principal; but if he takes an assignment of such a judgment to a stranger, and does not intend to satisfy it, the judgment will not be extinguished by the payment.

BILL in chancery. The plaintiff was surety for one Hines in a bond payable to Clark, who transferred it to Anderson, who brought suit on it in the name of Clark to the use of Anderson. Judgment was entered up against Hines and the plaintiff, and the latter paid the amount of it to Anderson, who assigned it to him. The plaintiff did not intend to satisfy it, but wished to get control of it so as to avail himself of any lien which might exist under it upon Hines' property. Execution issued to the sheriff, who levied upon land of Hines, which was, however, subject to a deed of trust to defendant Williams, to secure a debt due by Hines to one Foreman. Defendant Sugg subsequently obtained a judgment against Hines, upon which execution issued, under which the sheriff levied upon the same land. Williams afterwards sold the land, and after discharging the debt to Foreman, he had a balance in his hands which, on being indemnified, he paid to defendant Sugg in part satisfaction of the execution in his favor. Plaintiff contended that the judgment in favor of Clark had a priority, and prayed to have it satisfied out of the surplus in the hands of the defendant Williams.

Devereux, for the plaintiff.

Iredell and Badger, for the defendants.

DANIEL, J. (after stating the case). We are of the opinion, that the plaintiff has no right to have priority in satisfaction of his debt, out of the balance of the purchase money which remained in Williams' hands, after satisfying Foreman's deed in trust. It is true that Clark's judgment against Hines

and Briley, and the execution issued on the same, were prior in point of time to that of the defendant Sugg. But the plaintiff, who was jointly bound with Hines in the judgment, paid the same to Anderson, who was Clark's agent upon record, and authorized to receive the debt. The writ against Hines being in the name of Clark, "to the use of Anderson," and all the proceedings in the cause so entitled, it was notice to the world of such agency, and Clark was bound by the act of Anderson, within the authority given him: *Clark v. Shields*, 3 Hawks, 461. Notwithstanding the plaintiff did not intend to extinguish the judgment by paying Anderson the amount, yet in a court of law and in a court of equity, it would have that effect. We have determined it would be so at law, in the case of *Sherwood v. Collier*, 3 Dev. 380 [24 Am. Dec. 264]. Is payment simply of a judgment of record, such an extinguishment of it, as to deprive a subsequent *bona fide* assignee of any remedy in a court of equity against the judgment debtor? To an action on a record, a plea of payment was not good at common law. But if a judgment of record had been paid, the defendant had a right to demand a warrant to some attorney of the court, authorizing him to enter up satisfaction on the roll: 1 Archb. Pr. 325; 2 Saund. Pr. Cas. 713. But by the statute of 4 Anne, c. 16, sec. 12, payment may be pleaded to an action on a judgment, if the whole judgment be satisfied: 1 Chit. Pl. 426. In analogy to the case of a bond in England, it seems to us that the assignee would have no remedy against the judgment debtor. If one have a bond in England, where bonds are not negotiable, and receives the money due upon it, and afterwards assigns it for valuable consideration, as unsatisfied, to another, who has no notice of the payment, yet the purchaser can have no avail of this bond: *Turton v. Benson*, 1 P. Wms. 497; S. O., 2 Vern. 764; 1 Str. 240.

If the plaintiff (a surety) had taken an assignment of the judgment against his principal and himself to a stranger, and did not intend satisfaction, then the judgment would not have been extinguished; and as execution had been issued on the same, it would have held its rank in the scale of priorities: *Hodges v. Armstrong*, 3 Dev. 253. But that has not been the case here. The plaintiff has paid the debt to the judgment creditor; by which payment he has reduced himself to the situation of a simple contract creditor of Hines. The general rule is, that if one of two joint obligors, being a surety, pays off the debt, he is at law merely a simple contract creditor of the principal; if

the principal dies, equity will not convert him into a specialty creditor: *Copes v. Middleton*, 1 Turn. 231;¹ *Worffington v. Sparks*, 2 Ves. 569. (As to administration of deceaseds' estates, the act of assembly makes the surety, who has paid a bond, etc., a specialty creditor.) In *Jones v. David*, 4 Russ. 277 (3 Cond. Ch. 665), the plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond; he was still only a simple contract creditor to the testator. The assignment was but an idle formality; the assignment of an instrument which had ceased to have any legal force, could not confer any legal right. The plaintiff, as a creditor of Hines, can not, in this court, follow the assets in the hands of Williams, a third person, without first obtaining a judgment upon his simple contract debt against Hines, and failing to get satisfaction by execution at law.

The bill must be dismissed, but without costs, as the defendant did not demur: *Jones v. David*, *ubi supra*.

By COURT. Bill dismissed.

Cited in *Peeples v. Tatum*, 1 Ired. Eq. 415, to the point that a surety against whom, with his principal, a judgment has been rendered, by paying the debt and taking an assignment of the judgment, does not become a judgment creditor, but a simple contract creditor; in *Hanner v. Douglass*, 4 Jones Eq. 266, to the point, that where an assignment of a judgment is made to a person not a party to the record, it remains a judgment debt.

PAYMENT OF A JUDGMENT BY A JOINT DEBTOR is regarded as a purchase, where for the purpose of keeping the joint security alone, he takes an assignment in the name of a stranger: *Sherwood v. Collier*, 24 Am. Dec. 264, note 265.

PAYMENT OF JUDGMENT DISCHARGES ITS LIEN, and a subsequent agreement of the parties can not restore it: *De La Vergne v. Evertson*, 19 Am. Dec. 411, note 413.

PAYMENT DISCHARGES A JUDGMENT AT LAW, but not in equity, when justice requires that it should still subsist: *Fleming v. Beaver*, 19 Am. Dec. 269, note 631. See also *Head v. Gervais*, 12 Id. 577, note 582.

SCOTT v. DUNN.

[1 DEVEREUX & BATTLE'S EQUITY, 425.]

SUBROGATION OF PURCHASER FROM EXECUTOR TO RIGHTS OF CREDITORS OF TESTATOR.—Where an executor, under a mistake as to his power, sells lands of his testator, and applies the proceeds to the payment of debts, the purchaser will be subrogated to the rights of those creditors who have been paid by his advances, to the extent that the debts exceeded the amount of the personal assets.

1. *Copes v. Middleton*, 1 Turn. & R. 231.

BILL in equity filed by the plaintiffs against Dunn, the executor of William Kooling, deceased, and the other defendants, the devisees of said deceased. The bill charged that defendant Dunn, believing that the personal assets of his testator were insufficient to pay his debts, and that he was authorized by the will to sell the land to pay said debts, advertised it for sale at public auction, at which sale the plaintiffs purchased, paid the purchase money to Dunn, and received from him a conveyance. It also charged that the greater part of the purchase money so paid by the plaintiffs was applied by the executor to the payment of his testator's debts, and prayed that, as to that portion, the plaintiffs might stand in the place of the creditors who have been satisfied, and that the land might be sold for their payment; and, as to the part of said purchase money still in the executors' hands, it prayed that he might be decreed to refund it. All the defendants answered, and the cause was set for hearing upon the bill and answer.

Badger, for the plaintiffs.

Graham and Norwood, for the defendants.

GASTON, J. There is no contest between the plaintiffs and the defendant Dunn, as to the money of the plaintiffs not paid over, and for this sum they will of course have a decree against him.

The claim of the plaintiffs to be substituted to the creditors, whose demands they have satisfied, is supported, we think, by well-settled principles. By the laws of this state, real as well as personal property is liable for debts of every description; but personal property is the primary fund for their satisfaction. It is alleged, that the personal assets were insufficient for the discharge of all the debts. Whether this be the fact or not, can only be ascertained by taking an account of the assets, and of the administration of them. If, in taking the accounts, the fact should be established as alleged, then it follows from the doctrine, sanctioned in the cases of *Williams v. Williams*, 2 Dev. Eq. 69. [22 Am. Dec. 729], and *Saunders v. Saunders*, Id. 262,¹ that the defendant, Dunn, would have a right, in a court of equity, to be subrogated to those creditors who have been paid by his advances. As between Dunn and the plaintiffs, if their money were yet in his hands, he could not retain it with a safe conscience, and would be obliged to refund it. And it seems to us clear, that if he could rightfully reclaim it from his co-defendants, he might be compelled to assert this right, or permit

1. *Sanders v. Sanders*.

the plaintiffs to assert it in his name, in order that it might be refunded. The court would do this upon the same principle by which the surety, on making satisfaction to the creditor, becomes entitled to demand every means of enforcing payment which the creditor himself had against the principal debtor; a principle which, when traced to its origin, is founded on the plain obligations of humanity, which bind every one to furnish to another those aids to escape from loss which he can part with without injury to himself: *Home's Prin. of Eq.* 84. As all the parties are before the court, complete justice may be done by decreeing direct relief to the plaintiffs. The objections urged in this case are not, in our opinion, sufficient to repel the claim here advanced. There can be no relief at law, as to the money paid over, either against Dunn or the devisees. Not against him, for it has been applied in conformity to his agreement with the plaintiffs; not against the devisees, for between the plaintiffs and them there has been no contract. The doctrine of substitution which prevails in equity, is not founded on contract, but, as we have seen, on the principles of natural justice. Unquestionably the devisees are not to be injured by the mistake of the executor, as to the extent of his power over their land; but that mistake should not give them unfair gains. The executor was not an officious intermeddler in paying off the debts of his testator; and his erroneous belief that he could indemnify himself in a particular way, should not bar him from obtaining indemnity by legitimate means. It is not a question here, whether a mistake of law shall confer any rights, but whether such mistake shall be visited with a forfeiture of rights, wholly independent of that mistake.

It is immaterial to the devisees, whether the price at which the land was sold was a fair and full price or not; for that sale is not sought to be established. It is also unimportant, for any purposes now under consideration, to inquire wherefore the land was surrendered on payment of a sum less than its amount; for certainly no relief will be granted, except in respect to the sum actually paid. When the disposition of the costs shall come before the court, then this circumstance, and others of a like kind, will receive the consideration to which they may be entitled. The court therefore declares, that the plaintiffs may have the accounts taken as prayed for; and reserves the further consideration of the case, until the coming in of the commissioner's report

By Court. Decree accordingly.

RIGHTS OF PURCHASERS WHO, BY REASON OF VOID SALES, HAVE PAID OFF CLAIMS ON REAL ESTATE.—It is a rule of equity well established in several states of the union, that where land is purchased at a void judicial or execution sale by one who is ignorant of the fact that such sale is void, and who, in good faith, pays money which is applied to the extinguishment of an incumbrance or a lien upon the land, is entitled to be reimbursed the amount so paid by him to the extent, at least, that it has been applied in removing such lien or incumbrance: *Blodgett v. Hitt*, 29 Wis. 169; *Winslow v. Crowell*, 32 Id. 639; *Mohr v. Tulip*, 40 Id. 66; *Hatcher v. Briggs*, 6 Or. 31; *Levy v. Riley*, 4 Id. 392; *Union Hall Ass'n v. Morrison*, 39 Md. 281; *Vallé v. Fleming*, 29 Mo. 152; *McLean v. Martin*, 45 Id. 393; *Shroyer v. Nickell*, 55 Id. 264; *Howard v. North*, 5 Tex. 290; *Andrews v. Richardson*, 21 Id. 287; *Morton v. Welborn*, Id. 772; *Hudgin v. Hudgin*, 6 Gratt. 320; *Sands v. Lynham*, 27 Id. 291; S. C., 21 Am. Rep. 348; *Blight's Heirs v. Tobin*, 7 Mon. 612; 18 Am. Dec. 219; *Forman v. Hunt*, 3 Dana, 614; *Springs v. Harven*, 3 Jones Eq. 99, citing the principal case; *Haynes v. Meeks*, 10 Cal. 110; *Williamson v. Williamson*, 3 Smed. & M. 715; *Grant v. Lloyd*, 12 Id. 191; *Jayne v. Boisgerard*, 39 Miss. 796; *Short v. Porter*, 44 Id. 533; *Douglas v. Bennett*, 51 Id. 680; *Bright v. Boyd*, 1 Story, 478; S. C., 2 Id. 605; *Kanawha Coal Co. v. Kanawha & Ohio Coal Co.*, 7 Blatchf. 391; *Williams v. Gibbs*, 20 How. (U. S.) 535; Freeman on Void Judicial Sales, secs. 50, 51. The same principle applies in case of void sales of personal property: *Dufour v. Camfranc*, 11 Mart. 610; 13 Am. Dec. 364; *Dunbar v. His Creditors*, 2 La. Ann. 727; *Stockton v. Downey*, 6 Id. 581; *McLaughlin v. Daniel*, 8 Dana, 182; *Ragland v. Green*, 14 Smed. & M. 194; *Bentley v. Long*, 1 Strob. Eq. 43, 52.

The correctness of the principle stated in the foregoing rule is denied by some of the authorities: *Richmond v. Marston*, 15 Ind. 134; *Kinney v. Knoebel*, 51 Ill. 112; *Bishop v. O'Conner*, 69 Id. 431; *Dorlarque v. Cress*, 71 Id. 380; *Chambers v. Jones*, 72 Id. 279; *Putnam v. Ritchie*, 6 Paige, 405; *Nowler v. Coit*, 1 Ohio, 519; 13 Am. Dec. 640; *Lieby v. Ludlow*, 4 Ohio, 469; *Salmond v. Price*, 13 Id. 368. But the rule in Ohio has since been changed by statute, which provides "that whenever upon the sale of property on execution, the title of the purchaser shall be invalid by reason of a defect in the proceeding, the purchaser may, in equity, be subrogated to the right of the creditor against the debtor to the extent of the money paid and applied to the debtor's benefit, and, to the same extent, shall have a lien on the property sold, as against all persons excepting *bona fide* purchasers without notice." These provisions are made applicable to all sales by order of court, sales by executors, administrators, and guardians, and to sales for taxes: 44 Ohio L., 114, secs. 1, 2.

From the language used in some of the decisions, it is not easy to determine clearly upon what principle the rule is based. Some of them, like the principal case, refer it to the principle of subrogation. But it is difficult to perceive how that principle can be made to embrace this class of cases. It is only those persons who are compelled as sureties, or otherwise, to discharge obligations for which others are primarily liable, who can be subrogated to the rights of those whose liabilities they have discharged. A voluntary purchaser at an execution or judicial sale can hardly be placed in that category. He is not a surety, nor does he buy under compulsion. The principle, then, on which such purchaser is held to be entitled to have refunded to him the amount paid by him, on the sale's turning out to be void, must be one covering a wider ground than the principle of what is properly called subrogation. Justice Story, in the celebrated case of *Bright v. Boyd*, 1 Story, 494, refers

it to the maxim of the common law: "*Nemo debet locupletari ex alterius incommodo*; or, as it is still more exactly expressed in the digest, *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores.*"

The case of *Bright v. Boyd* may be regarded as the great leading case upon the subject now under discussion, and, as it is extensively relied upon in all the subsequent important decisions on the subject, we shall review it at some length. The case arose in Maine, and was tried in the year 1841, before Justice Story and Judge Ware. The facts were these: The real estate of a testator had been sold by an administrator with the will annexed, to pay the debts of the deceased. The property brought its full value, and the purchaser, believing that he had acquired a good title, entered and made extensive and valuable improvements upon the premises. It was subsequently ascertained that the administrator had not complied with the statute in making the sale, and it was held that no title passed to the purchaser. The devisee brought an action of ejectment against him, and recovered upon the strength of his legal title. Bright, the purchaser, who was in possession, thereupon filed a bill to compel the devisee, Boyd, before he should be allowed to take possession under his judgment, to pay for the improvements, and also money which had been advanced by the complainant in buying up outstanding claims. Justice Story, after very mature deliberation and great research, gave to the complainant the relief prayed for in the bill. In delivering the opinion of the court he said: "The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value under a title which turns out defective, he having no notice of the defect, is one, upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I own, that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law: *Nemo debet locupletari ex alterius incommodo*; or, as it is still more exactly expressed in the digest: *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores.* I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law, from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements, which he has beneficially made upon the estate; and thus to recoup them from the rents and profits. So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. In each of these cases, the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. But it has been supposed, that courts of equity do not, and ought not to go, further, and to grant active relief in favor of such a *bona fide* possessor, making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in *Putnam v. Ritchie*, 6 Paige, 390, 403, 404, 405, entertained this opinion, admitting at the same time, that he could find

no case in England or America, where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just, that in such a case, the true owner should recover and possess the whole, without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable, thus to appropriate to one man the property and money of another, who is in no default. * * * I have ventured to suggest, that the claim of the *bona fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and in this view of the matter I am supported by the positive dictates of the Roman law." The learned justice then proceeded to show that these principles have been adopted into the laws of all modern nations that derive their jurisprudence from the Roman law, and added: "There is still another broad principle of the Roman law which is applicable to the present case. It is, that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him. Now, in the present case, it can not be overlooked that the lands of the testator, now in controversy, were sold for the payment of his just debts, under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge, to which they were liable by law. So that he is now enjoying the lands free from a charge, which, in conscience and equity, he, and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me, that the plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid a circuity of action to get back the money from the administrator, and thus subject the lands to a new sale, or, at least, in his favor, in equity to the old charge. I confess myself to be unwilling to resort to such a circuity in order to do justice, where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge, to which they are *ex æquo et bono*, in the hands of the present defendant, clearly liable."

The matter was then referred to the master to take an account of the enhanced value of the premises, and all other matters were reserved for consideration upon the coming in of his report. More than two years later the case came up for final decision, when Justice Story stated that the views expressed by him at the former hearing had been by further reflection strengthened and confirmed. On this occasion he said: "I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by

his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation:" 2 Story, 607. This decision has been frequently cited with approval and relied upon as authority by the courts of a large number of states. In the case of *Vallé v. Fleming*, decided in 1859 (29 Mo. 152), a void administrator's sale had been made, and its proceeds applied to the payment of a mortgage previously existing on the lands sold. Ejectment was brought against the heirs of the purchaser, and they filed an equitable defense, and prayed to be subrogated to the rights of the mortgagees. Napton, J., who delivered the opinion of the court, reviewed the case of *Bright v. Boyd*, quoted from the decision at considerable length, and strongly approved the principles there laid down. In concluding his opinion, the learned judge said: "Nothing could be more unjust, we may repeat, than to permit a person to sell a tract of land and take the purchase money, and then, because the sale happens to be informal and void, to allow him, or, which is the same thing, his heir, to recover back the land and keep the money. Any code of law which would tolerate this would seem to be liable to the reproach of being a very imperfect or a very inequitable one. We think that, upon well-established principles of equity law, the owner of the land should, if he wishes to get it back, repay the purchase money, which he has received, or which he will receive if he gets the land. This may be done upon the compensation doctrine of courts of equity, with which, as it is settled on all hands, it is not inconsistent, if we regard the claim of the owner under such circumstances, as the Roman law treated it, as a case of fraud or ill faith. But whether this equity be administered under the name of compensation, or by substituting the purchaser in the place of the creditors, whose debts he has paid, or by giving him the benefit of the mortgage which his money has paid off, is not material. The answer put in by the defendants should not have been stricken out, and, in order that the answer may be reinstated and the case may be tried upon these equitable principles, the judgment is reversed, and the case will be remanded."

The next important case on this subject is *Blodgett v. Hill*, 29 Wis. 169, decided in 1871. The decision in that case ably reviews the decisions on the subject, from that of *Bright v. Boyd*, which it highly approves, down to *Vallé v. Fleming*. The facts of the case in *Blodgett v. Hill*, are thus succinctly stated by the learned judge who delivered the opinion of the court: "The evidence on this subject is, that the defendant bid off the land at the administrator's sale, for three hundred and sixty-five dollars; that out of this sum he paid the Boyd mortgage, amounting to nearly two hundred and fifty dollars; and that he paid the balance of the purchase money to the administrator. The whole of the purchase money was applied to the payment of the mortgage, of other debts against the estate, and of the expenses of administration. The land in question stood chargeable with the payment of such mortgage, debts, and expenses. The payments made by the defendant on account of his purchase inured to the benefit of the owners of the land. There is no manner of doubt but the defendant purchased the land, and paid his money therefor, in perfectly good faith, supposing that he was obtaining the whole title thereto; and there is no pretense that he had any actual notice of the defect in the proceedings before the sale, which invalidates his

title." And the court in that case held "that the whole purchase money paid by the defendant for the land in controversy, and the interest thereon, less the mesne profits of the land (exclusive of the improvements placed thereon by him), during his occupancy thereof, to the twenty-second day of May, 1862, is a lien and charge upon the land; and that the plaintiffs can not have restitution of the land claimed by them, until the amount of such lien and charge is paid." The case next in order of time is the *Union Hall Association v. Morrison*, 39 Md. 281, decided in 1873. In that case the complainant purchased in good faith, for full value, without notice of any defect in its title, and believing it to be good, a lot of ground described in the deed as a part of military lot No. 3905, and erected on it valuable buildings. Morrison, the appellee, was the owner of a tract of land called "The Trap," but was ignorant of its exact limits until it was ascertained, by actual survey some years after the erection of the buildings, that it included a part of the military lot. Morrison then brought ejectment, and recovered judgment, which was affirmed, and the sheriff being about to turn out the complainant, he filed a bill praying that the appellee might be compelled to pay the difference between the value of the improvements erected by the appellant and a fair ground rent for the period of its occupancy of the land, and that such balance be decreed a lien upon the land. The court decided that the appellee should have the option to accept payment for the lot, without the improvements, and to convey the same to the appellant by a sufficient deed, or to take the lot and the improvements, paying to the appellant the value of the improvements, to the extent that they increased the value of the land, and that in default of such payment, the amount should be declared a lien on the property, which should be decreed to be sold for the payment thereof.

Bartol, C. J., in delivering the opinion of the court, after quoting from the opinion of Justice Story, in *Bright v. Boyd*, said: "This careful and well-considered decision meets with our entire approval, and rests upon such plain principles of equity, that we have no hesitation in adopting it, as applicable to the case before us. It seems to us that so far from introducing any 'new principle into the law of the court,' as said by Chancellor Walworth, it is nothing more than the application of the well-settled principles of equity, to a case coming clearly within their scope and operation. It can make no difference in the equitable rights of the appellant, whether it appears in the character of complainant or defendant." The latest case on this subject that we have been able to find is that of *Hatcher v. Briggs*, 6 Or. 31. This was a suit in equity brought by complaint in the nature of a cross-bill, to restrain the respondent Briggs from prosecuting an action at law, commenced by him for the recovery of the possession of certain real estate in the possession of the complainant Hatcher, and for the recovery of damages for the wrongful withholding thereof. The appellant prayed the court to declare the title to the premises to be in him, but in case the court found the title not to be in him, then he prayed a decree that he recover from the respondent the amount of the purchase price paid by him at the alleged sale of the land, and received by the respondent, with interest thereon from the date of such sale, for the present value of the improvements made on the premises, and for taxes paid. The evidence clearly showed that the purchase was made in good faith, for full value, without any suspicion that the sale was void, and that the whole of the purchase money had been applied to the use and benefit of the respondent, or received and retained by him. The court granted the alternate relief prayed for, and McArthur, J., in delivering the opinion of the court, reviewed several of the cases hereinbefore referred to, and said: "After mature deliberation, we too have concluded to follow the

principles announced in *Bright v. Boyd*, and the other cases sustaining the same views, as more in consonance with equity and justice than the decisions in *Putnam v. Ritchie*."

The cases just reviewed were professedly decided upon the authority of *Bright v. Boyd*; but the case of *Hudgin v. Hudgin*, 6 Gratt. 329, decided in 1849, by the court of appeals of Virginia, seems to be an independent authority in support of the same doctrine. In that case the testator by will charged his lands with the payment of his debts. After his death, a portion of the lands so charged were sold, and the proceeds applied to the payment of the debts. The sale and conveyance were subsequently declared void, and some of the devisees brought ejectment against the purchaser, and recovered judgment. The defendant in ejectment filed his bill in equity, and obtained an injunction restraining proceedings upon the judgment. The court directed a decree declaring the purchase money so paid in good faith by the purchaser at the void sale, and the interest thereon, after deducting the rents and profits, to be a charge on the land, and providing, that unless the devisees paid this amount within a reasonable time, the land should be sold for the satisfaction thereof. This decision is cited and its doctrine approved in *Sands v. Lynham*, 27 Id. 304, decided in 1876. The same doctrine seems to have been early established by the courts of Kentucky: See *Bell's Heirs v. Barnett*, 2 J. J. Marsh. 516; *Thomas v. Thomas*, 16 B. Mon. 420, and other cases cited above. It was also applied at an early date by the courts of those states which have been influenced by the principles of the civil law. In *Howard v. North*, 5 Tex. 316, the court say: "It was a well-established rule under the Spanish system of jurisprudence; and its justice should commend its adoption and recognition, in all codes, and by all courts." And in *Dufour v. Camfranc*, 11 Mart. 615; 13 Am. Dec. 364, decided in 1822, Porter, J., delivering the opinion of the court, said: "It has been proved that the proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he can not recover in this suit, until he repay that money. This is the doctrine expressly laid down by Febrero, lib. 3, cap. 2, sec. 5, n. 357. And we readily adopt it; for nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts."

PURCHASER AT VOID SALE MADE UNDER PROCEEDINGS TO FORECLOSE a mortgage succeeds to the title and rights of the mortgagee, and may enforce them as the mortgagee could have done if the sale had not taken place: Freeman on Void Judicial Sales, sec. 50; *Brobst v. Brock*, 10 Wall. 519; *Gilbert v. Cooley*, Walk. Ch. 494; *Johnstone v. Scott*, 11 Mich. 246; *Lillibridge v. Tregent*, 30 Id. 105; *Jackson v. Bowen*, 7 Cow. 13. The principal case is distinguished in *Laws v. Thompson*, 4 Jones, 107; *Holt v. Bason*, 72 N. C. 310, and *Wall v. Fairley*, 77 Id. 108.

HARRIS v. HORNER.

[1 DEVEREUX & BATTLE'S EQ. 455.]

ASSIGNEE OF PROPERTY TO SECURE DEBT DUE TO HIM, IS NOT A BONA FIDE PURCHASER, without notice, where he pays no money as a consideration of such assignment.

BILL to compel an account. The plaintiff obtained a judg-

ment against Stephen Clements, who was in the state of Tennessee. The plaintiff left this judgment in the hands of John J. Carrington, as his agent, and he sent it with James Carrington to Tennessee to be collected. The latter took in payment thereof notes of one Terry, and James and Stephen Clements. John J. Carrington became insolvent, and executed to defendant Horner a deed of assignment. The deed mentioned the debts committed to James Carrington for collection, and all the property taken by him in satisfaction of them. James Carrington, by order of John J. Carrington, delivered the notes to defendant Horner. The plaintiff filed this bill to compel Horner to account to him for the amount of the judgment above mentioned. The defendant said that John J. Carrington told him, and he believed the statement, that he had purchased the judgment for a valuable consideration from the plaintiff, and insisted that he was a *bona fide* purchaser, without notice.

Graham and Waddell, for the plaintiff.

Mangum and Norwood, for the defendants.

DANIEL, J. (after stating the facts). There has been a great deal of testimony taken in this cause. We have examined it, and are satisfied, that the judgment in favor of the plaintiff, against Stephen Clements, as mentioned in the bill, was truly the property of the plaintiff; and that it had been placed in the hands of John J. Carrington, as agent of the plaintiff, to be sent to the state of Tennessee for collection. The defendant, by his admissions, had sufficient evidence before him to put him upon inquiry, if he had in fact advanced or paid at the time a valuable consideration for the judgment. But we are of the opinion, that he does not come within the principles of the rule, as he in fact was nothing out of pocket by the assignment, so far as relates to this judgment. The inducement for the assignment was old debts due by Carrington to him, and already incurred liabilities; but no acquittance was given for the same to Carrington. There was no present loss to the defendant in consequence of the assignment. The defendant admits that he received the judgment or notes which were given for it. The evidence proves, that he was compelled to receive this debt and others in horses, and as a just loss on the claims.

We are of the opinion (as Carrington is insolvent), that the plaintiff is entitled to a decree for an account of so much of the judgment as the defendant has actually received. It is there-

fore referred to the master of the court of equity for the county of Orange, as a commissioner to state and report what sum in cash value the defendant Horner has received on the said judgment, allowing him reasonable commissions for his trouble in collecting that sum.

By COURT. Decree accordingly.

HE IS NOT A BONA FIDE PURCHASER who merely takes the legal estate in payment of, or as security for, a previous debt: *Dickerson v. Tillinghast*, 25 Am. Dec. 528, note 531; see also *Potts v. Blackwell*, 4 Jones Eq. 61, and *Holderby v. Blum*, 2 Dev. & B. Eq. 52, citing the principal case; *Donaldson v. Bank of Cape Fear*, 18 Am. Dec. 577, note 590; *Lockwood v. Bates*, 12 Id. 121, note 136.

CASES
IN THE
SUPREME COURT
OF
OHIO.

PRESIDENT ETC. OF THE BANK OF CHILLICOTHE *v.*
THE MAYOR ETC. OF CHILLICOTHE. WOODBRIDGE,
CASHIER OF THE BANK OF CHILLICOTHE, *v.* THE
MAYOR ETC. OF CHILLICOTHE.

[7 OHIO, PART II, 31.]

A POWER TO BORROW MONEY IS INCIDENT TO THE OTHER USUAL POWERS OF
A MUNICIPAL CORPORATION, and may be exercised by such a body, even
though no express grant of the power is found in the charter of the cor-
poration.

DEBT. The declarations in each of the cases were demurred
to. The other facts of the case are sufficiently illustrated by
the opinion.

Wm. Allen and Leonard, in support of the demurrer.

Swan, contra.

By Court, HITCHCOCK, J. These cases are of great impor-
tance, on account of the principles involved, and have been
argued by counsel with the ingenuity and ability which the im-
portance of those principles demands. It must be admitted,
too, that the cases are of that description where there is dan-
ger that a court, from its earnest desire to do justice, may
be led astray upon points of law, notwithstanding all its
anxiety to the contrary. For it is certain that if the defense be
legal, it is manifestly unjust, and such a defense as no court
would sustain, unless impelled to it by some well-settled and
unbending principle of law. The corporation of Chillicothe
have borrowed the money, for the recovery of which these suits

are brought. In one instance it was done in pursuance of a vote of the people of the town constituting the corporation. This money has been used, as we are bound to believe, for the interest of the town; and non-payment is resisted, upon the ground that this same corporation had not power to borrow the money, and that in doing so, they violated their charter. The language of the defendants to the plaintiffs is, in substance, this: true you loaned to us this money, you did it at our earnest solicitation, we have used it for our own benefit; but we have no power to borrow, we violated our charter in so doing, and we will take advantage of this our own wrongful act, to protect ourselves from the payment of that which is your honest due. No rule of decision which will lead to such manifest injustice ought to be adopted without careful examination and much deliberation.

These cases, as now presented, are believed to be of the first impression, as counsel, with all their research, have not been able to produce a decision in point. As between natural persons, it is true that inability to contract constitutes a defense. Hence the pleas of infancy and coverture are sometimes interposed to avoid the payment of a debt, which an honest man or woman might be desirous to discharge. And such pleas are formed [favored] in law, not so much on account of their abstract justice, as from considerations of general policy. But although corporations have existed for centuries, still we have found no case in which inability to contract has been set up to avoid the payment of their debts. There are, it is true, many cases where the powers of particular corporations have been investigated, and where they have been held to have exercised power not granted to them, in consequence of which their acts were void; but these have been cases where the corporations themselves have been striving to set up or enforce powers, not where they have set up as a defense, that they themselves had been guilty of a usurpation of power. Such are cases against individuals charged with trespasses or other misfeasances, and where the defense is, that they acted in pursuance of powers delegated to them by corporations. Such was the case of *Colter v. Colty*,¹ 5 Ohio, 393, relied upon as an authority for the plaintiff. It was an action for replevin for fifty kegs of gunpowder, and the defendant justified under the plea that he was marshal of the city of Cincinnati, and that he retained the gunpowder under an order of the corporation, because it had been

1. *Colter v. Doty*.

forfeited for violation of a city ordinance. The court held that the corporation had no power to create a forfeiture, and, therefore, that the defendant was not justified. To have assimilated that case to this, it should have been against the corporation itself, and the corporation should have relied upon the defense, that they were exonerated, because, in the creation of the forfeiture, they had been guilty of usurpation.

As a general principle, no corporation can exercise powers not granted in its act of incorporation. This act is its constitution, and whenever it oversteps the limits therein prescribed, its act so far becomes void. But where certain powers are specifically granted, these carry with them such others, as incidental thereto, as are necessary to carry those specified into effect. It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are, in these days, granted: 2 Kent Com., 2d ed., 298, 299; *Head v. The Providence Insurance Co.*, 2 Cranch, 127; *Dartmouth College v. Woodward*, 4 Wheat. 636 [686]; *Beatty v. Knowler*, 4 Pet. (U. S.) 152; *Planters' Bank v. Sharp*, 6 How. (U. S.) 322; *Angell & Ames on Corp.*, c. 3, sec. 6; c. 8, sec. 12, pp. 82, 232, 3d ed. But a different rule of construction ought to prevail where a corporation is endeavoring to extend its power to the injury of others, and where it sets up by way of defense to an action brought against it, that it has itself been guilty of usurpation of power.

In considering this case, it is not my purpose to enter minutely into the arguments of counsel, although there are some principles advanced for defendants in the opening argument, in which I can not fully concur. In justice to counsel I will say, that this argument evinces much thought and reflection, and as a political production, is worthy of great consideration. It seems to me, however, that it might have been better addressed to the mayor and commonalty of Chillicothe, and to the people of that town, to dissuade them from contracting their debts, than to this court, to induce us to lend our aid to the corporation in avoiding their payment.

It is said "that the delegated power to borrow money, is in its nature a high, independent, substantive sovereign power, and can, therefore, in no instance pass from its primitive source, but by express grant." I do not know that I fully comprehend what is intended by this proposition—according to my understanding, it amounts to this, the power to borrow money being a high, substantive, independent, sovereign power, has its source with the people, who are the primitive source of all

power, and must remain there until expressly granted. If this be true, it must follow that the corporation of Chillicothe have not power to borrow money, and could not have had, had it been expressly granted in the act of incorporation, and for the reason, that the people have not delegated in the constitution, this power to the general assembly—and no one will pretend that this body can confer upon a municipal corporation a power which it does not itself possess. Upon this principle debts contracted by the general assembly for money borrowed, are not binding upon the state; I am not prepared to admit this question, it goes at once to destroy all confidence in the public faith.

This is not the doctrine, however, which the counsel intends to advocate. He supposes this power is expressly given to the general assembly, because, as he says, it "is among the sovereign powers of legislation," and "all legislative power is expressly given in the first article of the constitution, to the general assembly." That the general assembly have the power to borrow money, I have no doubt, and I agree with counsel that this power is conferred by the grant of all legislative power. The only difference between us is in the nature of the power. He considers it as a substantive, independent, legislative power. I consider it as incidental, general, legislative power. It is not of that "high, independent, substantive, sovereign" character contended for. This power resting in the general assembly, may be granted by that body to a municipal corporation, either expressly or as it possesses it itself, incidentally or by implication.

That this power is not expressly granted to the corporation of Chillicothe, is admitted, and the only question is, whether it is granted by implication. In order to arrive at a correct conclusion, it is necessary to examine the act of incorporation. The original act was passed on the twenty-eighth day of December, 1813. In the first section the limits of the town are specified, and the same is erected into a town corporate by the name of Chillicothe. The second section provides for the election of officers, and the third, that the mayor, recorder, treasurer, and common councilmen, elected in pursuance of the second section, and their successors in office shall be a body corporate, by the name of the "mayor and commonalty of the town of Chillicothe," with capacity "to purchase, receive, possess, and convey any real or personal estate for the use of said town of Chillicothe; provided the clear annual income shall not exceed four thousand dollars."

In the fifth section, power is given "to lay a tax within said town," for the purposes, and to be assessed in the manner in the act specified.

In the sixth section, power is given "to erect and repair public buildings for the benefit of said town, and make and publish laws and ordinances in writing, and the same from time to time alter and repeal, as to them shall seem necessary, for the internal safety and convenience of said town of Chillicothe and the inhabitants thereof."

From these extracts it will be seen that this corporation, as by that law constituted, had legislative power; this power, it is true, was restricted to such objects as should seem necessary for the internal safety and convenience of said town of Chillicothe, and restricted, too, so far that the laws made and published, should not be contrary to the laws of the state or of the United States. It had the power further, "to purchase, receive, possess, and convey any real or personal estate for the use of the town, to erect and repair public buildings for the benefit of said town," etc.

If the power to borrow money be, as is insisted by counsel, a substantive legislative power, or, according to my apprehension of the subject, an incident to legislative power, and if it became necessary for the safety and convenience of the town, or to carry into effect the power granted to purchase real or personal estate, or to erect or repair public buildings, to borrow money, there could be no objection to passing a law or ordinance to that effect. When passed, it would be obligatory on the corporation, and the money procured would constitute a debt which the corporation must discharge. Such law would contravene no principle of the constitution or laws of the state or of the United States, or any principle contained in the charter of incorporation. To effect other objects than those specified in the charter, money could not with propriety be borrowed. But if it should be, that circumstance could hardly be set up as matter of defense against an action brought for the recovery of the money. It would rather be a question between the individual corporation and their officers, or it might be between the state and the corporation.

This act of December 28, 1813, was amended by an act passed on the fourth day of February, 1825; although by this amendatory law, all parts of the original law within its purview were repealed, it added to, rather than diminished the power of the corporation. Like the former law, it conferred

power on the corporation to lay a tax, which might be increased to any extent by a vote of the freeholders and householders of the town at an annual election. It also conferred upon the mayor and common council the "power to pass and publish all such laws and ordinances as to them shall appear necessary, for regulating the streets, alleys, and highways, and for cleansing, raising, paving, draining, turnpiking, or otherwise keeping the same in repair;" and also, "to pass all such laws and ordinances relative to the good government of the town," etc. If in effecting any of these objects it became necessary to borrow money, the corporation might with propriety do it. In one of the cases now before the court, the money was borrowed expressly for improving one of the streets.

For the purpose of purchasing real estate, erecting and repairing public buildings, cleansing, raising, paving, draining, turnpiking, and otherwise keeping streets in repair, contracts must necessarily be made. Ultimate payment, it is true, must be made from taxation. But until money could be thus raised, it seems to the court that it might be provided otherwise, and in no way better than by borrowing. And really, I can not see the great difference whether a corporation shall be indebted to A. for labor in repairing streets or buildings; or to B. for money borrowed to pay A. for this same labor. The moral obligation to pay would be the same in either case.

In the cases now before the court, there is nothing illegal in the consideration, and there is no violation of any positive law or moral principle in the promises. The undertakings are not to do an illegal act, but to refund money actually borrowed. The plaintiff violated no principle of law in loaning the money, and certainly there would be nothing immoral in the defendants paying it. On the contrary, we think its payment is required by every principle of moral honesty, and prohibited by no arbitrary rule of law.

The demurrers to the declarations will be overruled, and judgment rendered for the plaintiffs.

Cited in *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 61, in support of the position that the powers of corporations are only such as are conferred by their charters, either expressly or as incidental to their existence.

IMPLIED POWER OF A MUNICIPAL CORPORATION TO BORROW MONEY.—It is well settled that the implied powers of a corporation are those only that are necessary to carry into effect the powers expressly granted; though, indeed, sometimes the word "convenient" is substituted for "necessary." By "necessary" it is not meant, however, that the object of the corporation could not possibly be attained, if a power is denied, but it is intended that the other

methods left would be so cumbersome, as to be practically inoperative. This principle is to be applied to corporations, whether public or private, in determining any question as to their implied powers, but the results are so different in the two cases when the determination sought is as to the existence of an implied power to borrow money, that they had best be examined separately.

As to municipal corporations, two distinct classes of cases may arise.—the one where the charter of a municipal corporation confers upon it powers or imposes upon it duties, in addition to the grant of ordinary corporate powers, of such a character that their purposes can not be fulfilled by the exercise of the ordinary revenue provisions, because of their requiring the immediate expenditure of large sums of money.

The second case is that in which the charter confers only ordinary municipal powers. The power of borrowing is obviously necessary to the exercise of the express power in the first of these cases, and is therefore admitted even by those decisions that deny its existence in the latter case: *Hackettstown v. Schwackhamer*, 37 N. J. L. 191; *Gause v. Clarksville*, 5 Dill. 165; *Mayor v. Ray*, 19 Wall. 468. As to the second case, the authorities are in direct conflict. Judge Dillon thus speaks of the subject in his work on municipal corporations, sec. 117: "The question of the incidental authority of municipal corporations to borrow money has not been so thoroughly considered, and so often decided as to be entirely closed to controversy. In view of the legislative practice to confer in terms all powers so important as this, the dangerous nature of this power, by reason of the temptation it holds out to incur needless debts and to make extravagant expenditures, and the facilities it offers for fraud, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants, the author, where the legislative will is wholly silent, would be strongly inclined to deny the existence of a general implied or incidental power to borrow money."

With the courts favoring Judge Dillon's view, the greatest stress has generally been laid upon the tendency that this implication of power would have in encouraging fraud, corruption, and extravagance in the municipal officers. In *Mills v. Gleason*, 11 Wis. 491, there was a question made as to the validity of municipal bonds, because issued without express authority; but the court said: "It is claimed that the city had no power to make this loan or issue its bonds therefor. There is no special act and no provision in its charter authorizing it, and it was said that without this, the power to borrow money did not exist, and could not be claimed as incidental to the execution of the general powers granted by the charter. The charter does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would pass as an incident to the execution of their general powers, according to the well-settled rule, that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects than that of borrowing money." The power to borrow money was likewise upheld in *Williamsport v. Commonwealth*, 84 Pa. St. 495, where Judge Paxson, delivering the opinion of the court, in reference to Judge Dillon's views, said: "The ground principally relied upon by the learned author, and others who take this view of the question, is that the power is a dangerous one. But showing that the power is dangerous does not show

that it does not exist. Power is always dangerous. Yet it must be lodged somewhere, or human governments cease to exist. Without it they can neither repel aggression from without, nor suppress disorder from within. A government without the power to execute its own laws would be contemptible, and of no more stability than a rope of sand. To withhold power merely because of its liability to abuse is utopian. It is not too much to say that instances of such abuse can as readily be found in the national and state governments as in the humblest municipality." These opinions seem to uphold the proposition that a power, if it would be convenient to a corporation, should be accorded it, unless it has been expressly prohibited by law, whereas the true doctrine is that the power to be implied should be "necessary." They overlook the inconvenience that would spring from the granting of the power, because of its being convenient in another respect. In the supreme court of the United States the subject is an open one, for there, in the case of *Mayor v. Ray*, 19 Wall. 468, four judges expressed themselves in favor of the power, while the same number expressed views just the reverse.

Of the cases denying the power to a corporation, one well considered is that of *Hackettstown v. Schwackhamer*, 37 N. J. L. 191. There Beasley, C. J., delivering the opinion of the court, said: "It has often been said that the means which can thus be raised up by implication must be necessary to the successful prosecution of the enterprise, and the circumstance that they are convenient will not legalize their introduction. But the necessity here spoken of does not denote absolute indispensableness, but that the power in question is so essential that its non-existence would render the privileges granted practically inoperative or incomplete. * * * Taking this as a ground of our reasoning, I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right can not, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable, as common experience demonstrates. In the great majority of instances the municipal affairs are with ease and completeness transacted without it. I do not wish to be understood as indicating that under certain special conditions an opposite deduction may not be legitimately drawn. It is plain that it is practicable to impose a duty on a municipality requiring the immediate use of large sums of money, and in such a situation the inference may become irresistible that it was intended that funds were to be provided by loans. My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly into the face of all experience to claim that the ordinary municipal operations can not be efficiently carried on except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been and are now being improved and governed. For the attainment of these loans it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes. Consequently I am unable to perceive any necessity to borrow money under these conditions from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached without a resort

to the device of raising moneys by loan, there is not the least legal basis for a claim of power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question can not be called into existence by intendment, and as I claim the fact to exist, I must, of necessity, reject the right of implication in question." The power was likewise denied to municipal corporations in *Wilson v. Shreveport*, 29 La. Ann. 673, and also in *Gause v. Clarksville*, 5 Dill. 165. The question is evidently yet an open one.

Before leaving the subject it might be of use to distinguish between the power of borrowing and the power that municipal corporations undoubtedly possess, of creating indebtedness in the pursuit of their municipal powers or duties. A case illustrative of the distinction is that of *Ketchum v. City of Buffalo*, 14 N. Y. 356. In that case, the city of Buffalo, possessing the power to "establish markets," purchased in pursuance thereof a market site, and gave therefor a written evidence of indebtedness of the amount of thirty-five thousand dollars, payable in twenty-five years, bearing interest meantime at the rate of seven per cent.; the power was upheld. It might appear at first view that this differed little from borrowing, for it surely could have mattered little to the city that she directly contracted a debt to A., or that she paid him immediately with funds borrowed from B. The difference, however, is this, that in the case put, the credit of the corporation is used in contracting directly for the accomplishment of an object authorized by law, so that by no possibility can the consideration of the debt be diverted to any illegitimate purpose.

In other words, such a case only declares, that after a debt has been contracted in the legitimate pursuit of corporate powers, the corporation may evidence the debt by writing, a doctrine recognized quite universally: *Hackettstown v. Schwackhamer*, 37 N. J. L. 191; *Douglass v. Virginia City*, 5 Nev. 147; *New Albany Bank v. Danville*, 60 Ind. 504; *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Sturtevant v. City of Alton*, 3 McLean, 393; *City of Galena v. Corwith*, 48 Ill. 424; *First Municipality of New Orleans v. McDonough*, 2 Robin. 244; *Clarke v. School District No. 7*, 3 R. I. 199. The existence of this power goes far as an argument in overturning the necessity of the implication of any power to borrow.

If money has been improperly borrowed in advance of liabilities actually created, and reaches the municipal treasury, and is expended by direction of the governing body for authorized municipal objects, the municipality may then be liable in the proper action or suit, but the action should be, we think, for money had and received, or by suit in equity, and not upon the invalid bonds: *Bateman v. Mid-Wales Railway Co.*, L. R., 1 Ch. Pr. 499; *Thomas v. Port Hudson*, 27 Mich. 320; *Hackettstown v. Schwackhamer*, 37 N. J. L. 191; *Reg. v. Litchfield*, 4 Ad. & El. (N. S.) 891; *Mayor v. Ray*, 19 Wall. 468, per Bradley, J. The holder of such bonds will, it seems, be considered as the assignee and owner of the original claim of the payee: *Onida Bank v. Ontario Bank*, 21 N. Y. 490; *Mayor v. Ray*, 19 Wall. 468, per Hunt, J.; *Shirk v. Pulaaski Co.*, 4 Dill. 208; *Paul v. Kenosha*, 22 Wis. 266; *Gause v. Clarksville*, 5 Dill. C. C. 165; Dill. on Munic. Corp., sec. 126, note. The power to borrow, if not expressly given, has been denied to counties in Mississippi: *Beaman v. Board of Police of Leake Co.*, 42 Miss. 588. The less extensive powers of counties make this a much clearer case than that of municipalities.

IMPLIED POWER OF PRIVATE CORPORATIONS TO BORROW.—It seems to be the law that private corporations, established for the object, amongst others, of private emolument, have the power of borrowing money, unless expressly

prohibited. The doctrine was thus stated in *Barry v. Merchants' Exchange Company*, 1 Sandf. Ch. 289: "Corporations are usually created for some limited and specific purpose, and therefore the general powers incident to a body corporate at common law are restricted by the nature and object of each. And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law, or the provisions of its charter. Upon this principle, and to the extent stated, a corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends. If chartered for the purpose of building a bridge, it may contract a debt for the labor, the materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land or materials, or to pay for such labor. And as evidence of the indebtedness and as security for its repayment, it may execute to the creditor a promissory note, a bond, or a mortgage, whether the debt be for the money borrowed, or for the work, materials, or land." In consonance with this, it has been held that private manufacturing corporations may borrow money for the purpose of carrying on their operations: *Burr v. McDonald*, 3 Gratt. 215; *Fay v. Noble*, 12 Cush. 1; that railroad corporations may: *Lucas v. Pitney*, 3 Dutch. 229; that banking corporations may: *Curtis v. Leavitt*, 15 N. Y. 9; that religious corporations may: *Davis v. Proprietors of the Second Universalist Meeting-house in Lowell*, 8 Metc. 321.

In the dissenting opinion of Selden, J., in *Curtiss v. Leavitt*, 15 N. Y. 269, however, it is strongly contended that the power of a corporation should be restricted to the creation of indebtedness in carrying on its particular business, for which thereupon it might give evidence of indebtedness. This rule, as has been above stated, has been applied in various instances to municipal corporations, and evidently many of the same considerations would apply in favor of extending it to private corporations.

ST. CLAIR v. WILLIAMS.

[7 OHIO, PART II, 110.]

TENANT FOR LIFE CAN NOT SUE UPON A COVENANT OF WARRANTY in a prior deed in fee to one under whom he derails; therefore there is no such action for a widow, who has been evicted of the lands assigned to her as dower, upon the covenant of warranty to her husband.

ACTION of covenant. The plaintiff, a widow, had been evicted under title paramount of lands assigned to her as dower. The lands had been deeded in the past by defendant, with covenant of warranty to Davis, who had afterwards conveyed to plaintiff's husband. Plaintiff claimed the benefit of the covenant.

For, for the plaintiff.

V. Worthington, contra.

By Court, LANE, J. The question arising in this case is, whether the right of action upon a covenant of warranty annexed to a conveyance in fee, passes to one who holds but an

estate for life in the land. It is no subject of doubt that an assignee is entitled to the benefits of all covenants running with the land: *Backus v. McCoy*, 3 Ohio, 219 [17 Am. Dec. 585]; *King v. Kerr*, 5 Id. 156 [22 Am. Dec. 777]. Nor is it doubted, where a covenant running with the land is divisible in its nature, as if the entire interest of separate parts of land pass to different individuals, that a right of action accrues to each party, to recover his proportion of the warranty: *Tapscott v. Williams*, 10 Id. 444; *Van Horne v. Crain*, 1 Paige Ch. 455; *Astor v. Miller*, 2 Id. 78; Touch. 199; Co. Lit. 385, 386. But a plain distinction is made between the holder of a part of the land, and the holder of a part of the estate; the former may vouch as assignee, or bring *warrantia chartæ*; the latter has the benefit of the warranty by aid prayer, or by the voucher of him who holds the remainder: Co. Lit. 385 a; 4 Dane, 51; Wood's Conveyancing, 373. The same distinction is carried into the modern action of covenant. The assignee, upon whom is cast the benefit or the obligation of the covenants, is he who holds the whole estate or term: *Holford v. Hatch*, Doug. 183; *The Earl of Derby v. Taylor*, 1 East, 502. These principles settle the present suit. The plaintiff could not vouch as assignee, nor have *warrantia chartæ* under the ancient law, nor can she sustain an action of covenant, because she does not hold the whole estate. The right of action on the warranty passes to the heirs, and her remedy is by a new assignment of dower.

Judgment for defendant.

The principal case was cited in *Tapscott v. Williams*, 10 Ohio, 444, to the position, that a real covenant is single, and must be enforced in one action.

WILLYARD v. HAMILTON.

[7 OHIO, PART II, 111.]

A WORK MAY BE OF PUBLIC USE, though conducted and owned by a private corporation.

IDEM.—AN EXTENSIVE LINE OF CANAL to be constructed by a private corporation, and which in the act of its incorporation is declared to be a public highway, is a public use.

A PROVISION IN AN ACT THAT COMPENSATION SHALL FOLLOW, not precede, the taking of private property for public use, is constitutional.

A PROVISION THAT COMMISSIONERS APPOINTED BY THE LEGISLATURE ASSESS DAMAGES for private property taken for public use, does not infringe the right of trial by jury, guaranteed by the constitution.

TRESPASS for cutting timber. Defendant by his plea justified as agent of the Pennsylvania and Ohio canal company. To this there was a demurrer, because it did not appear therefrom that damages had been assessed for the property taken, nor that any provision had been made for assessing the same. Also, because it did appear that the Pennsylvania and Ohio canal was a work of private improvement, and therefore could not justify the taking of private property *in invitum*.

Bierce, for the plaintiff.

Todd, *contra*.

By Court, GRIMKE, J. This case presents some questions of very great importance, and yet, I believe, most of them have been already settled by this court. As, for instance in *Young v. Buckingham*, 5 Ohio, 488, it has been decided that bridges, turnpikes, and highways, are public works; and in *Cooper v. Williams*, 4 Id. 253 [22 Am. Dec. 745], and *Bates v. Cooper*, 5 Id. 118, that where private property is appropriated to public use, it is not necessary the damages should be assessed before the appropriation, and that the mode of assessment by commissioners is constitutional: 2 Kent Com. 339. It is very true that precedents are not of such binding authority that they may not be overruled, but they are naturally of very great weight. It is as necessary that there should be a law to restrain the court, as that there should be rules to restrain the conduct of individuals; and precedents constitute that law. The great principle on which society is constructed in this country is, that the welfare of the community is superior to that of private individuals, which is just the reverse of what it is in most other countries, where the welfare of the community is considered as subordinate to that of private individuals.

Hence, the spirit of public improvement has been carried further in the same period of time, in this country, than in any other. Highways, turnpikes, and canals are constructed because the public have an interest in them, and it is of more importance that the public should not be deprived of the right to have them constructed, than it is that private individuals should not be deprived of any of their privileges. And the security to the individual members of society is almost perfect, where there is a genuine exercise of the right. But, what shall be the test, whether a work is to be deemed a public improvement? It can not be the fact of its having originated with the legislature, or of its being conducted exclusively by agents ap-

pointed by them; for roads constructed under the authority of the county commissioners are as much public works as state roads which have been established by the legislature. The inquiry, then, must necessarily be, what are the objects to be accomplished? not who are the instruments for attaining them. A canal traversing the whole length of the state may be constructed by an incorporated company, while a road of twenty miles may be laid out under the authority of the legislature. Would the community have less interest in the former than in the latter? If they would have only as great an interest, then the question is answered, and the difficulty is solved; for the character of a work must depend upon its nature, and not its nature upon the name which is given to it. It is supposed that a good deal of difficulty and uncertainty will be the consequence of this construction. But he who has to deal with the affairs of men has necessarily some difficulty to encounter. Human interests are not like mathematical abstractions. If they were, there would be no opportunity for the display of prudence, judgment, and discretion, nor for the exercise of distributive justice in its various forms. There does not, however, appear to be much room for uncertainty in this case. Here is a canal, eighty miles in length, connecting the Ohio with the Pennsylvania canal. It is in reality a branch of the former. Suppose the original design had been to connect our great canal with the Pennsylvania canal, and that afterwards the canal from the lake had been cut so as to intersect it, then the Pennsylvania and Ohio canal would have been called the principal work, and the other only an appendage to it. But the time when these two improvements were undertaken can not make any difference in the character of public utility which belongs to them. So that if it is the nature of an undertaking which is alone entitled to give a name to it, there is neither difficulty nor uncertainty in the application of the rule. It is a consideration of great importance, too, that this canal is declared to be a public highway. It is, indeed, one which is decisive of the matter.

The constitution declares that private property may be appropriated to the public use, provided a compensation is made to the owner. This right to take private property, is called, by writers on public law, the eminent domain of a state, and there is a great difference of opinion among them upon the question, whether the state is bound to make compensation. The clause in our constitution was inserted for the purpose of settling

these doubts, and not, as has been generally supposed, for the purpose of rendering the compensation a condition precedent. It is intended as a public declaration in answer to the opinions of some European writers on the subject, that the owner is entitled to compensation, and was not intended to convey the idea that he must be paid beforehand. In *McGowen v. Starke*, 1 Nott & M. 387 [9 Am. Dec. 712], the supreme court of South Carolina have decided that the state is not bound to make compensation in such a case, and this is in consequence of their constitution containing no provision on this subject. It may be asked, what security is there that compensation will be made, unless it is made before the property is taken? Precisely that degree of security which exists in a multitude of other instances of infinitely greater moment, in which the citizen reposes a voluntary and unlimited confidence in the good faith of the state. Not to mention the case of the public creditors, who are never sure that they will be reimbursed until payment is actually made; the people are dependent from year to year on the legislature for the enactment of laws, which are intended to answer their most pressing wants. And if any selfishness is to be suspected on the occasion, there is less reason to apprehend its existence in this case, because the state does not make compensation out of its own funds in the first instance, but compels it to be made by the company. It is of infinite importance, that the citizens of the state should not consider themselves as merely isolated individuals, having no bond of connection with the common weal. They should consider themselves as united together for the advancement of the interest and happiness of the whole community, and not be disposed to repine at every little inconvenience which their patriotism may occasion them.

The charter of the Pennsylvania and Ohio canal contains very ample provision for the assessment of damages to the plaintiff. The ninth section declares that "whenever the owner of property and the company can not agree as to the amount, and can not also agree on some person or persons to appraise the same, that then the legislature shall appoint commissioners for that purpose." So that the act not only authorizes the appointment of a tribunal, in the selection of which the party has an immediate participation, but on failing to make the appointment, the legislature bind themselves to make another. But, in this event, it is the plaintiff himself who must first move in the business. They have given him an election to have the dispute settled by the simple and quiet arbitrament of his own

neighbors. And if he does not accept this, he should make application for the appointment of commissioners. How then can he complain that an act has not been done, in the performance of which he is to be chiefly instrumental?

It is immaterial in the shape which these pleadings have now assumed; but I understand that the commissioners have actually been appointed. But it is said that the right of trial by jury is violated by the appointment of commissioners. This is an objection which I have heard repeated ever since my earliest recollection of such matters; and yet it has always been made with that degree of hesitation which denotes that the objector is not altogether sure of the ground on which he stands. It has been constantly made in the progress of every public improvement which has been executed in the United States; and yet every one seemed to feel that, although it was striking and plausible, yet that it could not possibly be maintained.

The constitution declares that the right of trial by jury shall be inviolate; and the only way in which we can ascertain the true meaning of this clause, is by making inquiry whether, before the constitution was framed, jury trial was known in such cases in the territory of Ohio. And one of the first acts which I recollect, is that of the thirteenth December, 1799, by which five commissioners are authorized to take the land of private individuals, where the public convenience requires that a road should be conducted over it, and declaring that any three of the five may agree in the assessment of damages to the owners. This act is of great importance; for here were a people living under a republican form of government with almost every form of civil polity, the same as at present, who afterward frame a constitution for themselves, and who, in effect, declare that jury trial shall be held inviolate as it was before; and yet the intervention of a jury, in such cases, was not only unknown, but, by necessary implication, was absolutely prohibited. If it should be supposed that the term of our territorial government was too short to settle the true import of the term jury trial, the constitution and laws of the other states may afford us some light. But in examining these, it will be found that although the constitutional provision is generally the same as ours, yet that there is the greatest variety in the procedure which the laws authorize. In some of them, three commissioners are appointed; in some five, and in others a greater number. In some the appointment is made by the legislature; in others by the supreme court, and in others again by a county court. And

this has been the case, notwithstanding some of these states have changed their constitutions in the intermediate time, and have guarded the provision by no additional or explanatory declaration. Perhaps there is no constitutional question which has ever been discussed in this country, which has been so completely settled by contemporaneous construction and universal acquiescence. On what principle is it that juries are dispensed with in the greater number of our courts, in courts of equity, courts of admiralty, courts martial, and courts of justices of the peace? *Magna Charta* declares that no man shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land. Mr. Sullivan, secs. 39, 40, remarks that as juries were unknown in those courts before the great charter, their disuse constituted a part of the law of the land; and therefore, although that charter was the first great instrument which solemnly guaranteed jury trial to Englishmen, yet it has never been supposed that that institution constituted a part of the machinery of those courts. And I believe it would be equally difficult in that country to find an instance of the intervention of a jury, in the proper acceptance of the term, in a case like the present.

In *The Governor and Company etc. v. Meredith*, 4 T. R. 794, which was an action of trespass like the present, the defendants had acted under an act of parliament, authorizing the straightening the streets of a town; the act also appointed commissioners to assess the damage done to individual proprietors. The court were unanimous that the action would not lie. Buller remarked that where the public welfare required it, private property might be taken without making compensation, and that, therefore, on general principles, the action would not lie, but that at any rate, as commissioners had been provided to estimate and pay the amount of compensation, that that alone was a sufficient answer to the action.

The provision in *Magna Charta*, which I have referred to, is transcribed into the ordinance, omitting only the word life. And if the last six articles of this instrument are of perpetual obligation, then we have in Ohio the same law and the same course of proceeding as in England, and very nearly the same as in the other states of the union. If the law were otherwise, no courts would have time sufficient to try the infinite multitude of actions which would arise. It is sometimes said, that the utility of any political arrangement is no reason for committing an impropriety, but public utility

itself becomes sometimes a great rule of justice. They who make the constitutional objection in this case, do not recollect that if twelve men were selected, they could not be used in the way in which juries ordinarily are. Having no relation to any court of justice in the state, there would be no rule for appointing them in the way that common law juries are chosen, nor any reason for composing them of twelve rather than of any other number, nor for requiring unanimity in their decisions. And above all, there could be no presiding law tribunal, the conjunction with which is the peculiar and valuable feature of jury trial; so that after all, persons appointed for the purpose of assessing damages, would be nothing more than commissioners, as they now are, whatever name we might be pleased to give them. He who will take the trouble to examine our laws, as well before as since the formation of our constitution, will find that they are uniformly regarded as an appendage to the courts only. No juries are ever mentioned but such as are auxiliary to the administration of justice in some court; and on the whole, the conclusion to which we are justified in arriving is, that there is nothing repugnant to the constitution in the law under which the defendant defends himself. Objections of this kind should ever be listened to with attention and earnestness. For, although to decide upon the constitutionality of a law, is a duty which no judge should court; yet it is also one from which no judge should shrink.

The principal case was cited as authority, to the effect that a private incorporated company undertaking works of public benefit, such as a turnpike road, may lawfully be granted power to condemn private property, in *Kemper v. Cincinnati etc. Turnpike Co.*, 11 Ohio, 392, 393. In *Lamb v. Lane*, 4 Ohio, St. 176; *Hueston v. Hamilton etc. R. R. Co.*, 4 Id. 689; *Kane v. Cleveland etc. R. R. Co.*, 5 Id. 147; *Work v. State*, 2 Id. 307; *Beckner v. Williams*, 22 Id. 275, it was cited to the point that the right of jury trial was not a necessary incident to actions or proceedings for the appropriation of private property to public uses.

PUBLIC USE AND PUBLIC BENEFIT are convertible terms, denoting each works of public benefit: *Aldridge v. Tusculumbia R. R. Co.*, 23 Am. Dec. 307. It is no objection to a use being public that private emolument will result therefrom: *Beekman v. Saratoga etc. R. R. Co.*, 22 Id. 690, note, where the whole subject of public use is treated of.

RIGHT OF TRIAL BY JURY IS NOT INFRINGED by an act providing that commissioners may assess the damages accruing from the taking of private property for a public use: *Scudder v. Trenton Del. Falls Co.*, 23 Id. 756.

WOODS v. MCGEE.

[7 OHIO, PART II, 127.]

TROVER WILL NOT LIE FOR A PORTION purchased of a larger quantity of like property, where, subsequently to the purchase, there has been no further act done to specify and identify the part sold.

TROVER. An order had been given on defendant, by Henry Swearingen, in favor of Hutton, for six hundred barrels of flour. Defendant, at the time, had in his possession about one thousand five hundred barrels of flour of Swearingen's. Hutton's interest in the order subsequently came to plaintiff. The other facts of the case necessary to an understanding thereof, appear in the opinion. A nonsuit was granted on the trial. This was a motion to open the nonsuit and for a new trial.

Collier and Stanton, for the plaintiff.

Loomis, Melcalf, and Sutherland, contra.

By Court, GRIMKE, J. The question is, whether there has been a sufficient designation of this flour to authorize trover to be brought for it. Some of the English decisions teach a doctrine which is very latitudinarian, while others, and those the most recent, adhere to the settled principle, that where a part of an undivided mass of property is sold, it is necessary that some further act should be done, specifying and indentifying the part sold, before the action of trover will lie. In *Whitehouse v. Frost*, 12 East, 614, where a man having forty tons of oil in one cistern, sold ten tons to B., and received the price, and B. sold the same to C., and took his acceptance upon it, but no actual delivery was made of the ten tons, which continued mixed with the rest in A.'s cistern; it was held, that as between B. and C., the sub-vendee, the delivery was complete, and that trover would lie. *Jackson v. Anderson*, 4 Taunt. 24, was decided the year after, and it was there held, that trover might be maintained for one thousand nine hundred and sixty-nine dollars in a keg containing four thousand seven hundred dollars. No separation was made of the parcel claimed by the plaintiff, but the defendant had sold and converted the whole keg; and on this ground, Mansfield, C. J., placed the right of the plaintiff to recover. The next in order, is the case of *Austin v. Craven*, Id.,¹ where trover was brought for fifty hogsheads of sugar, and it was decided that it would not lie, because there was no specific quantity of loaves *in esse*, and so no identification of the

1. *Austin v. Craven*, 4 Taunt. 644.

part sold. The case of the oil is noticed with evident disapprobation. *White v. Wilks*, 5 Id. 176, presented the same state of facts as *Whitehouse v. Frost*. It was a sale of twenty tons of oil, out of a much larger quantity contained in cisterns, and it was held that trover would not lie. The determination in *Austin v. Craven* is ratified, and that in *Whitehouse v. Frost* is directly overruled. *Shepley v. Davis*, 5 Taunt. 616, was a sale of ten tons of hemp, part of a larger quantity. It was held, that until the part sold was weighed, the sale was incomplete. *Busk v. Davis*, 2 Mau. & Sel. 397, was a sale of ten out of eighteen tons of flax. It was held, that not being weighed and the part sold ascertained, that there was not a sufficient identification of this, to authorize trover to be brought. These are the leading cases in England, and it is easy to see that the weight of authority is against the action.

The case of *Pleasants v. Pendleton*, 6 Rand. 473 [18 Am. Dec. 726], is, however, a very strong case the other way. But it is impossible to hide from one's self, that the fact of the small difference between one hundred and twenty-three barrels, the whole quantity, and one hundred and nineteen barrels, the number sold, may have gone a great way to influence the judgment. It was a hard case, and hard cases always make a shipwreck of principles. It is impossible to answer the difficult inquiry. If a part only of the flour had been burnt, in that case, on whom would the loss have fallen? If A., being the owner of two thousand barrels of flour, sells one thousand to B., but without anything being done to ascertain the identity and individuality of the part sold, and one thousand barrels are consumed by fire, what is there to determine that that one thousand are the property of the vendee, and that he shall bear the loss? Until this question can be answered, we must adhere to the later English cases; or rather we must adhere to principle, which, looking to every consequence which may arise from any given combination of circumstances, establishes a rule which shall be liable to as little fluctuation as possible.

Motion overruled.

IN THE MATTER OF EBENEZER PRENTISS.

[7 OHIO, PART II, 129.]

A TENANT IN COMMON CAN CONVEY HIS INTEREST in a separate part of the tract held in common, and after such conveyance his grantee becomes tenant in common as to that part of the tract.

PARTITION CAN NOT BE HAD IN ONE SUIT OF SEVERAL TRACTS, by a tenant in common of all, where the ownership therein other than his is vested in persons who have between themselves no common interest in the separate tracts; therefore, where a tenant in common, owner of one third of an estate, brought suit to obtain partition, and it appeared that the other two-thirds interest had come to several, each of whom was owner of such interest in separate and distinct parts of the estate, his suit was dismissed.

PARTITION. Petitioner showed certain lands in the Connecticut western reserve to have been granted to Abigail Elliot, and that after the death of the latter, petitioner had received from one of the three heirs of the deceased a conveyance of her interest in the estate. Petitioner prayed that one third of such estate be set off to him. Notice by publication of the petition was given, whereupon twenty-two persons appeared, and by leave of the court contested petitioner's claim, each of such persons claiming to hold a several and separate portion of the lands described in the petition for himself. The case was submitted upon the pleadings, exhibits, and an agreed state of facts. In the statement of facts, it was agreed, amongst other things, that "defendants are the legal owners of that portion of Abigail Elliot's right not claimed by the demandant." The other material facts appear from the opinion. The court of common pleas dismissed the petition, whereupon a writ of error was brought.

Webb, for the plaintiff.

Boall and Worcester, contra.

By Court, HITCHCOCK, J. It will be seen by a careful examination of the statement of facts, that there is no controversy but that Frederick Miner, and those claiming under him, have the legal title to two thirds of the interest originally granted by the state of Connecticut to Abigail Elliot. Whether this title was acquired under a sale for taxes or otherwise, it is immaterial to inquire, so long as its legal existence is admitted. The record shows that the section in which this interest was classified, and in which partition is now demanded, has been surveyed into lots containing about hundred acres each, and that these lots or parts of them have been conveyed by Miner or his grantees to the defendants in severalty. So far as these defendants claim, therefore, they claim not as tenants in common in the whole, but as tenants in severalty of separate and distinct tracts. Now, admitting the right of the petitioner to one third of the interest originally vested in Abigail Elliot,

there can be no doubt that he is tenant in common to the extent of that interest in each and every of these several tracts or parcels, because to that extent he is tenant in common with the other proprietors of the whole section.

Having an interest in common in the whole section, it is insisted by his counsel that his co-tenants could not convey any part of their interest in a separate tract in the section, so as to vest in the grantee any title to the part so conveyed. This subject was fully considered by the court in the case of *Lessee of White v. Sayer*,¹ 2 Ohio, 110, in which case it was settled that a tenant in common could convey a part of his undivided estate; and that a deed by tenant in common, purporting to convey in severalty, is a good conveyance for the grantee's undivided part, within its boundaries. The correctness of this principle is recognized in the case of *Green's Lessee v. Emerick*,² 6 Id. 391. Upon the authority of these two cases we take the law to be settled in Ohio, that a tenant in common can convey a part of his undivided interest in the whole land, or his whole undivided interest in a part of the land: *Dawson v. Lawrence*, 13 Id. 513;³ *Dennison v. Foster*, 9 Id. 126. True the counsel for the plaintiff has commented upon the before-recited cases with considerable warmth, and some little asperity; but his argument has not satisfied the court that those cases were improperly decided. Nor is there anything in the nature of the case now before us, to lead to the conclusion that more substantial justice could be done by a different decision.

Such then being the law, there is but one question in this case, and that is, whether under our partition laws, an individual who has an interest in common in several tracts of land with others, who have no common interest with each other in those several tracts, can enforce partition unless by separate proceedings against those who, together with him, own those several tracts: *Harman v. Kelley*, 14 Ohio, 502. For instance, A. is tenant in common with B. in one section of land, and with C. in another; can he join the two together in one petition? It seems to the court clearly that he could not, and for the reason that he is joining together in the same suit, those who have no common interest. In order to sustain the proceedings, the petitioner must have a common interest, and those of whom partition is demanded must have a common interest in all the land sought to be divided.

1. *Lessee of White v. Sayer*.2. *Treon's Lessee v. Emerick*.

3. 13 Ohio, 543.

It follows that the court of common pleas did not err in the judgment complained of.

I am not prepared to say, however, that the petitioner can have no relief, except by separate proceedings, under our partition laws, against all these defendants. It is possible that by bill in chancery, where Miner and all claiming under him were made defendants, he might obtain relief. And that if a sufficient quantity of land to satisfy his claim, remains in the hands of Miner, it might be decreed to him. This, however, is a mere suggestion, and upon this point it is not intended to express any opinion.

The judgment of the court of common pleas is affirmed with costs.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PRESCOTT v. UNION INSURANCE Co.

[1 WHARTON, 399.]

INSURED VESSEL SPRINGING A LEAK a day or two after sailing, without any storm or other visible adequate cause, is to be presumed unseaworthy so as to exonerate the insurers from liability for repairs, even though she ultimately reaches her port of destination.

INSTRUCTION THAT THE LAW PRESUMES UNSEAWORTHINESS in such a case, if the jury find the fact to be as stated in the protest, that the vessel began to leak as soon as she sailed, and the leak continued and was increasing when a storm arose, so that she would have required repairs if there had been no storm, no contradictory evidence appearing, is not erroneous.

TO LEAVE IT TO THE JURY to presume facts without evidence to support such presumption is error.

ERROR to the district court of the city and county of Philadelphia in an action on a policy of insurance on a certain vessel, to recover for a partial loss incurred, as was alleged, in consequence of a storm, while on a voyage from Philadelphia to the island of St. Thomas, the defense being that the vessel was unseaworthy when she sailed. It appeared, from the captain's evidence and from the protest sworn to at St. Thomas, that the vessel sailed from Philadelphia July 1, 1830, the captain testifying that she was then sound and seaworthy; that from the fourth to the ninth she leaked so as to require pumping, the leak increasing so as to require at first two hundred strokes of the pump per hour, and afterwards two hundred and fifty strokes per half hour, and so that she had to be pumped every fifteen minutes; that on the ninth a gale of wind commenced, which continued at its height for about thirty-six hours, during which the leak increased so that the vessel had to be pumped

every five minutes, or at the rate of three hundred strokes per half hour; that if she had continued to leak as she did before the storm began, the captain would have deemed it necessary, on arriving at St. Thomas, to have her looked at before going to sea again; that with a cargo of ordinary merchandise it would not have been safe to go to sea in her again without repairs, though it would have been otherwise with a cargo which could not be damaged by water; that on her arrival at St. Thomas she was surveyed, and certain repairs were recommended, which were made, the cost of which was sought to be recovered in this action. Several nautical witnesses testified that two hundred strokes of the pump per hour were not more than would be required by common leaking, and did not necessarily render the ship unseaworthy, and that vessels otherwise sound had been known to leak so as to require as much as three hundred strokes per hour. On the other hand, one experienced witness testified that upon the facts stated in the protest, he considered the vessel unseaworthy. The judge charged the jury among other things: That there was an implied warranty of seaworthiness at the commencement of the risk in every marine policy, and that if the vessel were in fact unseaworthy, whether the insured knew it or not, the warranty was broken, and the insured could not recover; that the vessel, in order to satisfy the warranty, must be sufficiently sound to carry in safety the cargo put on board of her; that though the general presumption is that a vessel is seaworthy, yet where it is shown that she sprang a leak so as to require repairs, the burden is upon the insured to show that it was due to some fortuitous accident, and not merely to the working and straining of the vessel, or to some inherent defect, in which case the insurer would be exonerated; that where a vessel springs a leak soon after the voyage commences, without any accident or other apparent cause, the presumption is that she was unseaworthy when she sailed; that the protest is evidence in Pennsylvania, but the formal printed part is not to be given weight against the written part, or the testimony in court of those who signed it; and finally, that if the facts in this case were as stated in the protest—that the vessel began to leak when the voyage commenced, or soon after, and continued to leak until the gale set in, so that she would have required repairs if there had been no storm—then the law pronounced her unseaworthy, and the defendants were exonerated; but that it would be otherwise if they should find that there were any facts contradictory to these, and that the vessel was in fact sea-

worthy when the voyage began. The court subsequently repeated the first clause of the last instruction, in answer to a question propounded by the jury, whether the fact as to the vessel's leaking soon after leaving port was decisive as to her being unseaworthy, or whether that question was left to the jury to decide upon all the facts. Verdict for the defendants, and the plaintiff sued out this writ of error.

F. W. Hubbell and Haly, for the plaintiff in error.

Cadwalader and J. O. Biddle, for the defendants in error.

By Court, *SERGEANT, J.* The legal principles in relation to seaworthiness of vessels insured, are clearly and succinctly stated in the opinion of the (now) president of the district court, brought up with this record. The plaintiff insists, that the doctrine on the subject is not applicable to the present case. He admits the law to be, as laid down in the authorities, that if a vessel sails on her voyage, and in a day or two becomes leaky, and founders, or is obliged to return to port, without any storm, or visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed: *Munro v. Vandum*, Park Ins. 224;¹ *Talcott v. Marine Ins. Co.*, 2 Johns. 124.² But he contends, that if she perform the voyage, and arrive at her port of destination, she is to be deemed seaworthy, as between the insurer and the insured on the vessel, whether such leakiness has occurred or not. This would subvert the rule as to seaworthiness altogether, and make it depend not on the state and condition of the vessel at the time she sails, but on the event. It would substitute an unfair and dangerous test, in lieu of the wise and salutary requisitions imposed by the law; for the best-provided vessel may meet with misfortune, and founder at sea, or be compelled to return to port. On the other hand, a weak and insufficient ship may attempt the voyage, to the imminent danger of the lives and property on board, and yet escape destruction almost by a miracle. It is not by events, that human affairs are to be judged. Experience teaches us, that in a vast majority of these cases, unless due precautions are taken, disaster will ensue; and therefore the law requires it of the insured, as a condition precedent to the attaching of the contract of insurance, that the vessel at her departure from port be tight, stanch, and strong, well fitted, manned, and provided with all necessary requisites, to meet the perils of the ocean, which she is to encounter in her voyage. And the in-

1. *Munro v. Van Dam*, Park Ins. 221.

2. 2 Johns. 131.

quiry is not, after the voyage is ended, has she escaped, notwithstanding a gross neglect of all that prudence dictated for her preservation; but was she equipped and fitted out as she ought to have been. If she was not, she was not seaworthy—not worthy or fit to go to sea; not in a condition to meet and resist its perils. A contrary doctrine would tend to throw on the insurer the expense of repairs, which the insured himself ought to have disbursed before the vessel sailed. Besides, a vessel tight, stanch, and strong, and in good sailing condition, will pass, without harm, through assaults which would materially damage a leaky and infirm ship. The latter is not only less able to resist the shocks of the winds and waves, but the crew are exhausted by the necessity of pumping, and, therefore, incapable of performing their duty, when great exertions become necessary. She is not, therefore, so well manned as she otherwise would be.

Nor is it wise or safe to tempt owners and shippers to run into danger, when unprovided to meet it. The disasters of mariners, not infrequently of the most dreadful and appalling character, ought not to be multiplied, by stimulating them into unnecessary experiments, how far they dare venture in a leaky vessel. The law casts her mantle of protection over them, as well as the interests of the shipper, by declaring that no insurance on the vessel is valid, if she is put to sea in an unseaworthy state; and it is of importance to the great interest embarked in commerce, as well as to the preservation of life, that the requisitions of the law in this respect should not be relaxed. The owner should be obliged to perform his duty, and be induced to attend to that, which he alone can attend to, the state and condition of his vessel, and to place her, under the guaranty of the policy, in a condition fitted to meet those perils of the sea, which the insurer takes upon himself. If he does not, he throws on the insurer other perils not within the contract: perils which do not the less exist, because, by good fortune, they may happen not to prove fatal: and which may, of themselves, produce an average loss, without foundering the ship or defeating the voyage. If the owner does not choose to do this, or even if it occur without his knowledge or default (and the same rule applies to policies on goods), there is no contract: the consideration fails, and the risk remains with the party himself. We are, therefore, of opinion, that the doctrine is applicable, notwithstanding the vessel reaches her port of destination, if it sufficiently appear by the evidence,

that the vessel sailed in a leaky state, and in want of repairs. And this is the point of view in which the court below put the case to the jury.

2. Nor is there any foundation for the complaint, that the court took the facts from the jury, or assumed more than they ought legally to have done in charging them. The court applied the rule of law to the facts as they appeared, at the same time instructing the jury, that if there were contradictory facts, they might consider them, and the result would be different. There were, however, no contradictory facts shown, and the court would have erred to leave it to the jury to presume facts, without any evidence, from which such presumption could legally be drawn. "To submit a fact destitute of evidence," says Gibson, C. J., in *Stouffer v. Latshaw*, 2 Watts, 167 [27 Am. Dec. 297], "as one that may nevertheless be found, is an encouragement to err, which can not be too closely observed, or unsparingly corrected." To the same effect, is the opinion of the court delivered by Mr. Justice Rogers in *Star v. Bradford*, 2 Penn. 398. Here the evidence was clear, that from her departure, this vessel, with constant light breezes, leaked; that the leak continued increasing for nine days, so that the hands were obliged to pump, at first, every hour, then every half hour, and then every fifteen minutes; afterwards a storm commenced, and the vessel labored much, and shipped great quantities of water, till they had to pump every five minutes, and she continued very leaky, damaging the cargo, until her arrival. No evidence was given by the insurer to account for this state of the ship; there was no violence of wind or wave till the ninth day; there was not time for the ordinary working and straining of the timbers to produce a leak; and the inevitable presumption is, that she had an inherent defect at the time of sailing. This is the legal presumption, and so stated in the authorities, and elementary writers, and the court, in laying down the law to the jury, could do no otherwise than state that legal presumption on the facts existing. Upon the whole, the charge of the court is, in the opinion of this court, correct, and the judgment must be affirmed.

Judgment affirmed.

SEAWORTHINESS.—As to what is embraced in the term seaworthiness, see the note to *Warren v. United Ins. Co.*, 1 Am. Dec. 165. There is an implied warranty of seaworthiness on the part of the insured in every contract of insurance on a vessel: *Warren v. United Ins. Co.*, Id. 164; *Barnewall v. Church*, 2 Id. 180 and note. To the same effect is *Merchants' Ins. Co. v.*

Morrison, 62 Ill. 247, citing the principal case. And upon an insurance "at and from," this warranty is to be referred to the commencement of the risk, so that if, between that time and the time of sailing, the vessel becomes unseaworthy, the insured can not recover for a subsequent loss: *Garrigues v. Coze*, 2 Am. Dec. 493. The burden of proof as to the seaworthiness of an insured vessel is, in the first instance, on the insured; but if it appears that the loss may fairly be imputed to sea damage or other misfortune, then the *onus* rests upon the insurer if he undertakes to defend himself on the ground that the vessel was unseaworthy: *Brown v. Girard*, Id. 400. Where a vessel springs a leak soon after sailing, without any storm or other adequate cause, and is compelled to put back, or to seek a port of safety, or founders at sea, the presumption is that she was unseaworthy when she sailed, and the insurers are discharged: *Wallace v. De Pau*, Id. 662; *Talcot v. Commercial Ins. Co.*, 3 Id. 406; *Miller v. S. C. Ins. Co.*, 13 Id. 734. A survey and condemnation for unseaworthiness, not proceeding wholly on that ground, do not conclude the insured or prevent his recovery: *Haff v. Marine Ins. Co.*, 5 Id. 331.

INSTRUCTION NOT WARRANTED BY ANY EVIDENCE is erroneous: *Whitehill v. Wilson*, 24 Am. Dec. 326; *O'Fallon v. Boismenu*, 26 Id. 678.

UNION CANAL CO. v. YOUNG.

[1 WHARTON, 410.]

EJECTMENT FOR AN EASEMENT is not the proper remedy.

FEE PASSES BY A SALE TO A CANAL COMPANY OF LAND over which the canal is to pass, under an agreement which contains nothing to show that only a right of way was intended to be sold, where the company has a right to acquire land either in fee or for a less estate.

IN THE CASE OF AN AGGREGATE CORPORATION, if a freehold passes to it, it must be a fee or its equivalent, for as such a corporation never dies, a grant which would convey a life estate to an individual, passes to it an estate which is perpetual, or equivalent to a fee simple.

ADVERSE POSSESSION.—The entry of the owner of land is barred only by an actual, continued, visible, notorious, distinct, and hostile possession for twenty-one years, and such owner need not show a possession in himself or those under whom he claims within twenty-one years.

IN A CASE OF CONCURRENT POSSESSION, neither party can acquire title against the other by an adverse holding.

ADVERSE POSSESSION, WHAT NOT EVIDENCE OF.—Where an owner of land has sold part of it for a canal and possession has been taken, such owner, by paying taxes for the whole tract, or leasing the whole of it without excepting such part, or by his tenant raising a crop for a year or two on such part, or by running a fence over it, does not establish such an adverse holding as will ripen into a title.

QUESTION OF ADVERSE POSSESSION IS ONE OF LAW when the facts are admitted or distinctly proved.

QUALIFIED, BASE, OR DETERMINABLE FEE CAN NOT BE IMPLIED by law, but is created by the express terms of a deed, will, or other instrument of writing.

LAND SOLD FOR A CANAL CEASING TO BE USED AS SUCH does not revert to the grantor, where the sale was absolute and unconditional.

ACT TRANSFERRING EXISTING CORPORATE RIGHTS TO NEW CORPORATION.—

Where at the request of an association of stockholders in two corporations, an act is passed consolidating them into a single corporation under a new corporate name, abolishing the former corporate names, etc., and providing that the new corporation shall hold and enjoy all the estates, grants, rights, etc., enjoyed by the former corporations, a stockholder in one of the former companies who has granted land to it for the purpose of a canal, but who surrenders his stock and accepts stock in the new company, without objection, thereby acquiesces in the transfer of the corporate rights and property to the new corporation.

THERE IS NO SUSPENSION OF CORPORATE RIGHTS in such a case, the whole estate and interest of the old corporations vesting immediately in the new.

TO CONSTITUTE A BONA FIDE PURCHASER who will be protected against an equitable or legal title, of which he had no notice, it must be proved, independently of the recital in the deed, that the consideration was paid before receiving notice, and it is not enough to show that it was secured to be paid by mortgage or otherwise.

EJECTMENT commenced December term, 1833, by the Union canal company against William W. Young, Fox, Price, and others to recover certain land. It appeared that the land formerly belonged to William Young, deceased, and the plaintiffs claimed that he had sold the same to the Delaware and Schuylkill canal company, and that by an act of the legislature, passed at the request of the majority of the stockholders of that company, it was subsequently transferred to the plaintiffs. Two canal companies were incorporated in 1791 and 1792, for the construction of canals between the Schuylkill and Susquehanna and between the Delaware and Schuylkill, respectively. The Schuylkill and Susquehanna company was organized under an act passed September 29, 1791, and the Delaware and Schuylkill company under an act passed April 10, 1792. The provisions of these several acts with respect to the power of acquiring property, etc., are sufficiently stated in the opinion. William Young was a stockholder and for some time a manager of the Delaware and Schuylkill canal company. The line of the proposed canal passed over his land. On April 1, 1793, he entered into a parol agreement with the company to sell them the land necessary for the canal, to wit, one hundred and thirty-five perches, which was the land now in controversy. The company in the same year entered upon the land, and excavated the bed of the canal. A memorandum of this contract in Young's handwriting, dated July 16, 1798, in the form of an account, was produced in evidence. The land was paid for in stock issued to Young.

Several acts were passed after 1792, continuing the provisions of the act of April 10, 1792, in force for various periods. After the last continuance and before the time expired, to wit, on April 2, 1811, an act was passed which recited that the stockholders of the two canal companies above referred to had agreed to form a new company, combining the other two, and then provided for the formation of such a company under the title of "The Union Canal Company of Pennsylvania," and for the transfer of the estates, rights, etc., of the other corporations to it. The material provisions of that act are sufficiently stated in the opinion. On May 7, 1821, Young surrendered his stock in the Delaware and Schuylkill company, and accepted in lieu thereof ten shares of the stock of the Union canal company. On the part of the defendants much testimony was introduced, going to show that with the exception of digging out the canal on Young's land, in 1793, nothing was ever done to it by the Delaware and Schuylkill company; that the land was all included in a fence with other land occupied by Young, which fence had never been removed; that Young pastured the land, including the bed of the canal; that the whole tract was generally known as Young's property, and that the company never exercised any ownership over it, except the digging above mentioned; that the land was all assessed to Young every year, and he or his tenant paid the taxes thereon; that Young let the land in the inclosure, including the premises in dispute, to a tenant who occupied it from 1812 to 1830, the tenant having no knowledge of any owner but Young, and that the tenant had raised one or two crops of corn on the bed of part of the canal embraced in the inclosure. Fox and Price, defendants, claimed to be *bona fide* purchasers without notice, of parts of the land now in controversy. Their deeds bore date June 12, 1833. The plaintiffs proved, however, that Fox and Price gave mortgages to secure the purchase price of the land, and that they were served with written notice of the plaintiffs' title on June 28, 1833. Other facts are stated in the opinion. The plaintiffs had a verdict, and the defendants moved for a new trial. The opinion sufficiently discloses the grounds relied on.

E. K. Price and Broom, for the defendants.

Charles Ingersoll and W. M. Meredith, for the plaintiffs.

By Court, ROGERS, J. This was an action of ejectment to recover one hundred and thirty-five perches of land. On the trial of the cause, by consent of parties a verdict was taken for

the plaintiffs, subject to the opinion of the court upon the whole case.

The defendants contend: 1. That no estate passed to the plaintiffs, which will entitle them to recover in this action. 2. That if any estate passed, the plaintiffs have lost their right to recover. 3. That the defendants may rescind the contract. 4. That for part of the land, Fox and Price, two of the defendants, are *bona fide* purchasers, without notice.

By the second section of the act of the twenty-ninth September, 1791, the company have the power of purchasing, taking, and holding, to them, their successors or assigns, in fee simple, or for a lesser estate, all such lands, tenements, and hereditaments, as shall be necessary for the prosecution of their work. There is a like provision in the act of the tenth April, 1792. In the sixth section of the first act, it is provided, "that it may be lawful for the president and managers, to contract and agree with the owners of the lands and tenements, for the purchase of so much thereof as shall be necessary for the purpose of making, digging, and perfecting the canal, and of erecting and establishing, all the necessary locks, works, and devices," etc., if they can agree with such owners; but in case of disagreement, etc., the act provides for the issuing a writ of *ad quod damnum*, to assess the damages done to the owners of such lands and tenements, and on the return of the inquest directs the court to give judgment, and declares, that the company shall be entitled to have and to hold, to them and their successors and assigns forever, all and every the lands and tenements, etc., in the said inquisition described, as fully and effectually as if the same had been granted to them by the respective owners thereof.

It is immaterial in this controversy, whether the contract of sale between Mr. Young and the company was entered into on the first of April, 1792, or at a later period. The effect on the title is precisely the same. I must, however, be permitted to observe, that the evidence shows most clearly a parol contract of the first of April, 1792, of which a memorandum in writing was made in the handwriting of William Young, some time in 1798. The contract was executed by the entry of the company on the land, excavating it, preparing it for the uses and purposes of a canal, and by payments of the purchase money. The resolution of the third May, 1796, shows that the contract was made at or about that period of time. Be this as it may, the contract was made under the authority of the acts cited, and was followed by the company taking possession, as before

stated. The defendants contend, that under this contract the plaintiffs acquired an easement or right of way only, and that for an injury to such an interest, ejectment will not lie; and it is true, if it be an easement, ejectment is not the proper remedy, as ejectment will not lie for an incorporeal hereditament: 2 Yeates, 331;¹ 4 Day, 330.²

It will not admit of doubt, that the company might acquire, either by contract, or on a writ of *ad quod damnum*, a right to the soil, either in fee simple or for any less estate. In this, the acts are express. When a contract is made for a purchase, for the use of the canal, as well as for the use of an individual, the presumption is, as against the grantor or bargainor, that the greater estate was intended to pass. In the note or memorandum of Mr. Young, the quantity of the estate is not mentioned; but a sale of lands on an agreement to sell, imports a fee: Brooke Abr., tit. Contract, Bargain, and Sale, folio 169. In the case of a corporation aggregate, if a freehold passes, it must be a fee or an estate equivalent to it; for in a grant of land to a corporation aggregate, the word successors is not necessary, though usually inserted; for albeit, such simple grant be only an estate for life, yet, as a corporation never dies, such estate for life is perpetual, or equivalent to a fee simple, and therefore the law allows it to be one: 2 Bl. Com. 109.

The bill of Mr. Young has nothing on its face which indicates that he sold to the company the right of way, only; and if that had been his intention, it should have been so expressed in the instrument itself. Nor is the inference, which is drawn from the silence of Mr. Young, to be rebutted by calculations founded on the value of the land per acre, based on the price given for the whole tract, and of course, including in the estimate the improvements which were on the property at the time of his purchase. Calculations of this kind would be too uncertain; and it is impossible for us to say for what reason the vendor (supposing the fact to be as is alleged) chose to part with his property to the company for less than its real value. On the argument of this part of the case, reliance was had on the resolution of the thirtieth June, 1796, which directs Mr. Govett to give credit to Mr. Young for the amount of his damages, as settled, for the land occupied by the tract of the canal. The latter part of the resolution is nothing more than a description of the land for which the damages are directed to be paid; and as to the word "damages," the company have used

1. *Leasee v. Black v. Hepburn.*

2. *Stiles v. Curtis.*

the term which is used in the sixth section of the act of incorporation; the money which is given as a compensation to the owner, is given as his damages; and this as well where the company acquire a right to a fee simple, as any less estate.

But if a fee simple did pass, the defendants contend that the plaintiffs have lost the right of recovery. Under this head I shall consider:

1. The statute of limitations.
2. That equity will not lend its aid to enforce the plaintiff's claim.
3. That there is a condition annexed to the contract, which has not been performed.
4. That the company was dissolved in 1811.

After what has been already said, we must take it that the plaintiffs have a fee simple or an estate equivalent thereto in the property in controversy. The company had taken possession of the *locus in quo*, by excavating and embanking it, and filling up for the purposes of a canal. They had the only possession, which they were entitled to; for it may well be doubted whether they would have been at liberty to have taken an exclusive possession of the property, until the passage of the act of the twenty-ninth of March, 1819, which made it the duty of the company to confine its operations to the completion of the communication between the Tulpehocken, Quittapahilla, and Swatara creek. The company have, by these acts, acquired a concurrent, if not an exclusive possession. It is therefore incumbent on the defendants to show, either an abandonment of the right, or an ouster of the possession so acquired and held by the company, and a hostile and adverse holding by the defendants.

As to the allegation of an abandonment of right, there is scarcely a pretense, particularly as the plaintiffs had taken possession, and held the property, until 1819, for the purpose of complying with the acts, under which they were incorporated; for it must be observed, that until the passage of the act of 1819, the duty and right to make the canal remained as it was under the act of 1792; and more especially will not the doctrine of abandonment apply when the whole amount of the purchase money has been paid. The company, so far from relinquishing the right of property, asserted it, not only as to this, but to every other parcel of land held under similar titles. Indeed, I am not aware that their title has been the subject of dispute, except in this instance.

The entry of the owner of land is barred only by an actual,

continued, visible, notorious, distinct, and hostile possession, for twenty-one years. It is not necessary, to entitle him to recover in ejectment, that he should prove, that he, or those under whom he claims, have been in possession within twenty-one years before bringing the suit: *Hawke v. Senseman*, 6 Serg. & R. 21; *Mercer v. Watson*, 1 Watts, 330; *Rung v. Shoneberger*, 2 Id. 27 [26 Am. Dec. 95].

The title draws to it the possession; and when the possession is concurrent, no title can be acquired by either, on the ground of an adverse holding. The defendants claim the possession to have been adverse and hostile, because Mr. Young paid the taxes for the property, leased the land, without an exception of the part owned by the company; because the tenant raised a crop of corn for one or two years in the bed of the canal; and because a fence was removed, and a fence run across the line of the canal. I see nothing in any one, or all the circumstances adverted to, which brings this case within the rule so distinctly laid down in *Hawke v. Senseman*, and the other cases cited. Mr. Young continued to hold and enjoy the land in the same manner as he had been accustomed to do, at the time when the company were confessedly the owners of the land. There was no open, visible, and notorious change in his conduct, which could put the company on their guard, and make it, in proper time, their duty to assert their right. On the contrary, from any act of his, they could not have the slightest suspicion, that it was his intention to dispute their right. So far from this, he acknowledged their title by a receipt of the seventh of May, 1821, for ten shares of the Union canal stock, in lieu of his Delaware and Schuylkill stock. We can not in justice to Mr. Young, suppose that at that time he had any idea that he held the possession by a title adverse to the company. It admits of some doubt whether the whole tract without allowance, was assessed to William Young, but be this as it may, the payment of the taxes under the circumstances of this case (supposing the interest of the company liable to taxation), furnished no evidence of an adverse holding. To give title by the statute of limitations, the possession must be continued. Raising a crop of corn for a year or two is not sufficient to give title, nor will the fact that a fence was run across the line of the canal, have that effect. In conclusion on this part of the case, I will observe that the rule in this state is, that when there is a given state of facts, either admitted or distinctly proved, whether the possession is adverse, is a question of law; and it would be error

in such a case to submit the question of title, to be determined by the jury: *Rung v. Shoneberger*, 2 Watts, 27 [26 Am. Dec. 95]; *Star v. Bradford*, 2 Penn. 384.

It is suggested, that this is an equitable action, and that it is a principle in a court of chancery, that he who asks equity, must do equity. The principle, which can not be disputed, applies in its full force to an executory contract, when it is necessary to invoke the aid of the court. Chancery leaves the party to his remedy at law, unless he complies with the equity principles, which govern the decision of the court. I am not aware that the same strictness is applied to the case of a contract executed by delivery of possession, and payment of the purchase money; and in this particular, the cases cited differ from this case. There is a discretion undoubtedly vested in a court of chancery, but this is not an arbitrary discretion, but it is governed by certain fixed and well-defined rules. In order to claim the benefit of the rules, it is necessary for the defendants to show that they are entitled to equitable relief; and this must depend upon the construction of the contract. The equity on which the defendants rely, is, that the property was sold by William Young, on the condition of making the canal, which condition has not and can not be performed. They contend that the plaintiff acquired but a base or qualified fee; and if it be so, it is a flat bar to the plaintiff's action.

A qualified, base, or determinable fee is an interest which may continue forever; but the estate is liable to be determined by some act or event circumscribing its continuance or extent. The instances which are usually given to illustrate this species of estate, are a limitation to a man and his heirs so long as A. shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale, or till the marriage of B.; or so long as St. Paul's church shall stand, or a tree shall stand. In these and similar cases, the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations, or when the qualifications annexed to it are at an end. If the owner of a determinable fee convey in fee, the determinable quality of the estate follows the transfer. *Nemo potest plus juris in alienum transferre quam ipse habet.*

The general policy of this country does not encourage restraints upon the power of alienation of land. A qualified, base, or determinable fee is created by deed, by will, or by some other instrument of writing in express terms, and can not be implied by law. The instrument which creates the estate shows

at the same time its limitations. It is part and parcel of the title, and hence there is no injustice in the purchaser taking the estate with the determinable quality annexed to it; but here there is nothing in the agreement which qualifies the nature of the estate. It is an absolute sale of the fee simple without any restraint whatever; and it would be wrong that the vendee's title should rest partly in writing and partly in parol. If Mr. Young intended to sell a base fee, determinable when the canal ceased to be used, it should have been so expressed in the written evidence of the contract. It would be unjust that the law should imply this as a condition annexed to the agreement. The act of incorporation, as has been before stated, authorizes the company to purchase an absolute right of property in the soil, either in fee simple or for a less estate; and in estimating the price the owner has a right to demand its outside value, without any regard to any supposed advantage; the improvement may be to any other property which he may possess. The same rule governs the jury in estimating the damages to the owner on the writ of *ad quod damnum*. In this the act differs materially from the recent acts of the legislature, which direct that due regard shall be paid to the advantages which the improvement may be to the owner. In this contract it is fair to suppose that all these considerations were duly weighed, and that Mr. Young took his chance of a change of location, or any change of interest, either by the legislature or the company; if so, he has no more right to complain, when he has received the estimated value of his property, than any other citizen of the commonwealth. In the *Turnpike Company v. Irvin*,¹ 2 Penn. 466, it was decided that the benefit which results to individual property, by the incorporation of a company and location of a public road, does not in contemplation of law enter into the consideration of the contract of subscription; and such subscriptions are necessarily subject to the power of the legislature, to change the location of the road, when the contrary is not expressly stipulated.

The owner has no assurance of any benefit which may arise from the intended improvements, unless he chooses to make that a part of the contract. He depends altogether upon his calculation of chances. This may have operated upon the mind of Mr. Young. It is most likely he supposed the canal would greatly enhance the value of the remainder of his property. But this can not be relied on as a circumstance to in-

1. *Irvin v. Turnpike Co.*; 8. C., 23 Am. Dec. 53.

fluence the construction of the contract. A person may purchase a piece of property from a view of erecting a factory, or of engaging in some business which the vendor may suppose will be highly advantageous to the neighbors, and particularly to himself. This may be his motive for making the sale, and may have had an influence on the price, yet, unless it be made a part of the contract, the law will not annex a tacit condition to the sale, that it shall be applied exclusively to the purposes for which it was originally intended. Nor would a court of chancery interfere, even when the contract was executory, on an allegation that the vendee intended to apply it to a different purpose, unless there was fraud in the vendee. It can not be made to form part of the consideration of the contract, unless so expressed in the agreement; for this would be confounding, as is said in the *Turnpike Company v. Irvin*, the consideration of the contract, with the motive, which induced the parties to enter into it. Want of faith on the part of the company is not alleged. The alteration in the original plan has arisen from necessity, and not from choice. But aside from those general principles, I can not see what right Mr. Young and those who claim under him, have to complain.

By the act of the twenty-ninth September, 1791, the legislature incorporated the president, managers, and company of the Schuylkill and Susquehanna navigation, for opening a canal and lock navigation between the rivers Schuylkill and Susquehanna. And by the act of the tenth April, 1792, they incorporated the president, managers, and company of the Delaware and Schuylkill navigation, for opening a canal and water communication between the rivers Delaware and Schuylkill. On the second of April, 1811, the legislature, at the request of an association of a number of the stockholders of the two companies mentioned, who represented that they had formed a joint stock and interest under the title of the Union canal company of Pennsylvania, repealed all the acts before passed in favor of the Schuylkill and Susquehanna navigation, and of the Delaware and Schuylkill navigation. They enacted that the corporate title of said corporation should cease and be abolished, and that the corporate style and title of the said company should be the Union canal company of Pennsylvania, "under which name the said company shall have, hold, and enjoy, all estates, grants, rights, interests, and privileges heretofore held and enjoyed by them under their respective titles."

The fifth section directs the president to call a meeting of

the stockholders, upon notice given; and upon an agreement of a majority of the stockholders, certified to the governor, it is made his duty, by proclamation, to declare the law in full force and effect. It further provides, that if any of the stockholders of said company shall neglect or refuse to deliver their certificates of stock, in either of the said companies, and accept stock in the Union canal company of Pennsylvania, they may bring suit, etc., to recover a just compensation; and their interest in said company shall thereafter cease. In March, 1815, they passed an act to authorize a company to make a lock navigation in the river Schuylkill. On the twenty-ninth of March, 1819, the legislature passed the act supplementary to the act, entitled, "An act to incorporate the Union canal company of Pennsylvania." The eleventh section makes it the duty of the company to confine its operations and improvements to the completion of the communication between the Tulpehocken, Quittapahilla, and Swatara creek. In the act of the twenty-sixth March, 1821, the legislature guaranteed the interest on the stock of new subscribers, authorized by the act, for twenty-five years. And on the seventh of May, 1821, William Young received ten shares of the Union canal stock, in lieu of his Delaware and Schuylkill stock.

This short reference to the various legislative acts, shows, that up to the period of the passage of the act of 1819, the rights and duties of the company remained the same as under the original acts of incorporation. The legislature having incorporated a company for making a slack-water navigation in the Schuylkill, and by this means secured a water communication with the interior, thought proper to relieve the Union canal company from making the eastern section of the canal. But this by no means impaired their right to the property which had been vested in them by the act of 1811. The duty of completing the canal was a public duty, of the violation of which William Young had no more right to complain than any other citizen, and over which the legislature had a complete and absolute constitutional jurisdiction. They had the exclusive right to judge of the expediency of exempting the company from the necessity of finishing what they had so unsuccessfully begun; and of the policy of this course there can be now but one opinion. But what right have the representatives of William Young to complain? The legislature reserved to him the right to compensation, for his interest in the Delaware and Schuylkill company, but instead of availing himself of it, with a full

knowledge of all the legislative enactments, in favor of the company, and a certainty that the work would be completed, he, on the seventh of May, accepted the stock in the Union canal company, and surrendered his certificates of stock in the Delaware and Schuylkill company. He acquiesces in the transfer of the property to the company; for it will not do for him to avail himself of the advantages of the change, without at the same time submitting to any inconvenience or loss which may attend the substitution of the one for the other.

I have looked carefully through the acts which relate to these companies, but can not perceive, that at any time there was even a suspension of the rights and duties of the company. They have always stood in full force. The two first companies were merged in the Union canal company, and at the same time the right to all the estate was vested in the latter company, in the most full and ample manner. There has been no change which can affect the right to any estate which has been vested in them. It follows from what has been already said, that this is not a case where either party is at liberty to rescind the contract, particularly after the great change which had taken place in the circumstances of the parties, the increased value of real property, in that vicinity, and the express recognition and adoption of the contract by Mr. Young in 1821. Until the ejectment was brought, there was no offer to rescind the contract; and the stipulation which has been filed, can not be permitted now to vary the rights of the parties.

One other question remains. Are Price and Fox *bona fide* purchasers without notice? In the view we have taken of this cause, it is unnecessary to determine whether the possession of the company, and the various circumstances disclosed in the evidence, were sufficient notice to the purchasers, to put them on inquiry, as to the nature and extent of the interest which the company had in the property. The defense amounts in equity to a plea in bar, alleging that the defendants claim under a purchaser for a valuable consideration, without notice of the plaintiff's title. The principle of this plea, as Lord Eldon observes in *Wallwyn v. Lee*, 9 Ves. 24, and Justice Spencer, in 18 Johns. 562,¹ is, "I have honestly and *bona fide* paid for this estate in order to make myself the owner of it; and you shall have no information from me, as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself, in the article of purchasing

1. *Beckman v. Frost*; 8 C., 9 Am. Dec. 246.

bona fide." To the validity of such a plea, a number of particulars are absolutely essential, all of which are enumerated in Sug. 553, and in 4 Desau. 280. The plea must distinctly aver that the consideration money mentioned in the deed, was *bona fide* and truly paid, independently of the recital of the purchase in the deed; for if the money be not paid, the plea will be overruled, or the purchaser is entitled to relief against the payment. A consideration secured to be paid, is not sufficient. It seems clear from the authorities, that such a plea will protect the possession of a *bona fide* purchaser, without notice, from an equitable title, although even that has been sometimes questioned; but whether it will avail against a legal title is more doubtful. From a review of all the authorities, Sugden, in his treatise, seems to think it clear that the plea is a protection against a legal as well as an equitable claim, although this conclusion has been doubted by Chancellor Desaussure in *Snelgrove v. Snelgrove*; who observes, that when the title attempted to be set up, is an equitable one, it seems very reasonable that the court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the complainant comes with a legal title, I do not perceive how he can be refused the aid of the court. In Pennsylvania, under our recording acts, it can not well be doubted that it would be a valid defense, as well against a legal as an equitable title: *Moore v. Mahon*, 1 Ch. Cas. 34; *Maitland v. Wilson*, 2 Atk. 241;¹ 3 Id. 314;² *Hardington v. Nichols*,³ 3 Id. 304; *Snelgrove v. Snelgrove*, 4 Desau. 287; *Murray v. Finster*, 2 Johns. Ch. 157.

The purchaser is not protected, if he has notice, previously to the execution of the deeds and payment of the purchase money; for till then the transaction is not complete; and therefore, if the purchaser had notice previously to that time, he will be bound by it.

In England the rule is carried to a great extent, for it would seem that a purchaser is not protected, unless the whole purchase money has been paid. This precise point came before this court in *Youst v. Martin*, 3 Serg. & R. 423, where the English doctrine was overruled; and it was held, that where the purchaser has paid part of the purchase money, the owner of the equitable title can not recover the land without repaying the money paid by the purchaser, before receiving notice. With this equitable qualification, the rule itself is distinctly

1. Error.

2. 3 Atk. 314.

3. *Hardingham v. Nicholls*.

affirmed. The burden of proof is thrown upon the purchasers; and in this instance, the defendants have failed to prove payment in whole or in part of the consideration, independently of the recital in the purchase deed. The consideration is secured by mortgage on the property; but that, as has been seen, is not sufficient, inasmuch as equity will protect the purchaser against payment of it.

Motion for a new trial overruled, and judgment on the verdict.

EJECTMENT DOES NOT LIE FOR INCORPOREAL PROPERTY, and therefore it can not be resorted to for the recovery of a ferry: *Rees v. Lawless*, 12 Am. Dec. 295; and see the note to that case as to what is the proper remedy for the obstruction of an easement or franchise.

ADVERSE POSSESSION, WHAT NECESSARY TO GIVE TITLE BY: See *Rung v. Shoneberger*, 26 Am. Dec. 95, and the note thereto, collecting other cases in this series on that subject. See also *Sumner v. Murphy*, 27 Id. 397; *Smith v. Hosmer*, 28 Id. 354; *Proprietors of Enfield v. Day*, Id. 360. The foregoing opinion of Mr. Justice Rogers on this point is specially approved and followed in *Buckholder v. Sigler*, 7 Watts & S. 160.

TO CONSTITUTE A BONA FIDE PURCHASER, FULL PAYMENT must be made before receiving notice of an adverse equity: *Dugan v. Vattier*, 25 Am. Dec. 105, and note thereto referring to other cases in this series on the same point. See also *Dickerson v. Tillinghast*, Id. 528 and note. That full payment of the consideration is necessary to constitute one a bona fide purchaser who will be protected against an outstanding title, is a position for which *Union Canal Co. v. Young* is recognized as authority in *Hoffman v. Strohecker*, 7 Watts, 90; *Bellas v. McCarty*, 10 Id. 29; *Ludwig v. Highley*, 5 Pa. St. 141.

THE RECITAL OF PAYMENT OF THE CONSIDERATION in a purchase deed is not evidence in such a case, against third persons claiming a right: *Bolton v. Johns*, 5 Pa. St. 151; *Search's appeal*, 13 Id. 112; *Lutton v. Hesson*, 18 Id. 111; *Coze v. Sartwell*, 21 Id. 488; *Henry v. Raiman*, 25 Id. 360; *Lloyd v. Lynch*, 28 Id. 425. But such recital is evidence against a subsequent purchaser from the same grantor: *Pennsylvania Salt Manufacturing Co. v. Neel*, 54 Id. 19, all citing *Union Canal Co. v. Young*. See generally as to the effect of the consideration clause in a deed as evidence, the able opinion of Mr. Justice Cowen, in *McCrea v. Purmort*, ante, 103, and the cases cited in the note to that decision.

In *Pittsburgh etc. R. R. Co. v. Biggar*, 34 Pa. St. 461, *Union Canal Co. v. Young* is referred to as recognizing and reaffirming the principle of *Irvin v. Turnpike Co.*, 2 Penn. 466.

PHILADELPHIA SAVINGS INSTITUTION, CASE OF.

[1 WHARTON, 461.]

MEMBERS OF SAVINGS INSTITUTION, WHO ARE — Under an act incorporating certain persons, and those thereafter becoming members, as a savings institution to receive deposits upon interest, and providing “for the security of the depositors,” that the corporators and their associates shall raise a capital of a certain sum to be divided into shares, the holders of which are to receive dividends of the profits, and the capital to be liable for the deposits, and providing also that the directors shall have power to regulate the admission of members, and that there shall be annual meetings of members and a committee of members to investigate the affairs of the corporation, a stockholder does not become a member who is not admitted as such, nor does one originally a member cease membership on parting with his stock.

DIRECTORS CAN NOT DISFRANCHISE MEMBERS OF A CORPORATION under a clause in the charter giving them power to admit members.

RULES, to show cause why an information in the nature of a *quo warranto* should not be filed to determine by what authority certain persons, originally members of the Philadelphia savings institution, but who had since parted with their stock in the corporation, continued to exercise the rights of members; and also to show cause why a mandamus should not issue requiring the president and directors of the corporation to admit certain persons to whom shares of stock had been assigned, to participate in the business. The institution was incorporated by an act passed April 5, 1834. The provisions of the first section of the act are stated in the opinion. The substance of the fifth, sixth, and seventh sections, so far as material, is also stated. The second section provided that the object of the corporation should be to receive deposits from time to time from persons disposed to intrust their funds with the corporation, and to pay interest thereon as agreed upon by the directors, the rate of interest not to be reduced until after sixty days' published notice. The third section provided, that “for the security of the depositors,” the persons named in the first section, and their “associates,” should raise a capital of not less than fifty thousand dollars, nor more than two hundred thousand dollars, in shares of twenty-five dollars each, such capital to be at all times liable to depositors for the amount of their deposits and interest, and the shares to be transferable in the manner provided by the by-laws. The fourth section provided for a meeting of the “members” on such day in May following the passage of the act as should be designated by any three of the five persons first named in the act, and annually thereafter, on such

day in May and at such place as the by-laws should appoint, for the purpose of choosing "from among the members" thirteen directors, etc. Immediately after the incorporation, by-laws were passed providing, among other things, that any member might resign in a certain way, and that "every member who shall cease to be a stockholder shall at the same time cease to be a member;" also that to make one eligible to membership he should have been a depositor for one year, or a stockholder six months. These by-laws were repealed in 1836, and other by-laws were passed in their stead not containing any such provisions.

James S. Smith and Sergeant, in support of the rules.

W. M. Meredith and Broom, *contra*.

By Court, *ROGERS, J.* The rules obtained in this case, involve two questions, which depend upon the construction of the act of the fifth of April, 1834, incorporating the Philadelphia savings institution.

1. Is a stockholder, a member of the corporation, and as such entitled to participate in its business?

2. Does he cease to be a member when he ceases to be a stockholder?

In relation to the power of admitting members of a corporation, as is said in *Angell and Ames on Corporations*, 62, reference must often be had to the provisions and spirit of the charter; and when the charter is silent, we must look to the provisions of the common law, and to the particular nature and purpose of the corporation. In certain corporations (such for example as religious, charitable, and literary), the number of members is often limited by charter; and whenever there is a vacancy, it is usually filled by a vote of the company. As regards trading and joint stock operations, no vote of admission is requisite; for any person who owns stock therein, either by original subscription or by conveyance, is in general entitled to, and can not be refused the rights and privileges of a member: *Gray v. Portland*, 3 Mass. 364 [3 Am. Dec. 156]; *King v. Bank of England*, Doug. 524. In moneyed institutions, such as banks, insurance, canal, and turnpike companies, etc., the mere owning of shares in the stock of the corporation, gives a right of voting; and a stockholder ceases to be a member by a transfer of stock. There is then this marked distinction arising from the nature of the corporation. In the one case, a pecuniary interest is the evidence of membership; whilst the affairs of religious, charita-

ble or literary institutions are committed to those who have no pecuniary interest whatever in their management. If this were a corporation of the former description, it would greatly strengthen the argument of the respondent's counsel, but I can not view it in that light, but look upon this and all institutions of a like kind, as partaking of the nature of a charity, where the professed object is to advance the interests of the poor and helpless. The object of this institution is declared to be, to receive from time to time from all persons disposed to intrust them therewith, such funds as may be deposited with them, and for which they are to pay to the depositors such rates of interest, as may be from time to time agreed upon by the directors. These deposits, as is well known, are made in small sums by the poor; and the institution is professed to be more especially for their benefit. In aid of this object, and as subsidiary to it, the legislature in the third section directs, that for the security of the depositors, etc., it shall be the duty of the persons before named, and of their associates, to raise a capital, etc., of not less than two hundred thousand dollars, in shares of twenty-five dollars each, which capital is to be at all times liable to depositors for the amount of their deposits and the interest.

In other institutions of the like kind, the latter provisions are omitted: they were manifestly introduced into this charter, not for the benefit of the stockholders, but as an additional security or pledge to the depositors. As an inducement to make this investment, in the sixth section, the corporation is authorized to invest its funds "in public stocks of this state, or the United States, or real securities, or in the discount of notes and personal securities;" and in the seventh section, the directors are authorized to declare a dividend of the interest and profits of the corporation, after paying its expenses, and to pay it over to the stockholders, or their legal representatives. It seems to me, most clear, that the legislature had no intention of establishing a joint stock company, but that there was a mere modification or change in the provisions usually inserted in the charters of savings fund institutions.

But at any rate, these rules of construction only apply when the charter is silent. So that in this, as in every other case, we must look to the act itself, having regard to the particular nature and purpose of the corporation. In the charter there are antagonist interests; the interest of the stockholders is in some measure in opposition to the interest of the depositors.

It is for the benefit of the one to decrease, and of the other to increase the rate of interest on deposits; and hence there may be a peculiar propriety in the legislature to intrust the control of the funds to persons who have no pecuniary interest in the corporation. At least I perceive nothing in this, of which the stockholders have any right to complain. If the stockholders have the exclusive management of the institution, for which the respondents contend, a temptation is held out to divert the institution from its original and primary object, and convert it into a bank, differing only in the fact, that it is a bank of discount and deposit, and not of circulation. Besides, if a pecuniary interest is the only criterion of membership, it may with equal plausibility be said, that the depositors are members also, and as such entitled to participate in its management. In the first section, it is enacted "that the persons therein named, and all and every other person or persons, hereafter becoming members of the Philadelphia savings institution, in the manner hereafter mentioned, shall be and are hereby created and made a corporation by the name and style of the Philadelphia savings institution." The manner in which they can become members, is pointed out in the fifth section.

Among other matters, the directors have power to provide for the admission of members and furnishing proofs of such admission. This, we conceive, to be inconsistent with the idea, that a stockholder is *ipso facto* a member of the corporation; for if so, why confer the power to provide for the admission of members? The legislature do not confine the power to furnishing proofs of the admission of members, but they in express words, grant the power to admit members of the corporation. This we conceive, to be an authority to elect such persons as members, as they may deem best fitted to carry into effect the objects of the charter. The respondent's case also derives additional strength from the seventh section. A distinction is there taken between a member of the corporation, and a stockholder. It is made the duty of the directors to appoint from the members of the corporation, five competent persons as a committee of examination to investigate the affairs of the corporation; and in the same section, to declare a dividend, etc., and to pay the same over to the stockholders, or their legal representatives. Why, it has been asked, this change of phraseology, if a stockholder, as such, is a member of the corporation? It is also worthy of remark, that the legislature wholly omit to regulate the right of voting; a regulation always introduced in

all joint stock incorporations. It is the uniform policy to limit the number of votes to which stockholders may be entitled, in all such companies; a limitation which would not have been omitted, had the legislature conceived this to be an institution of that description.

Reliance has been placed on the word "associates," in the third section, which the counsel for the commonwealth says, must refer to stockholders. This is an argument not without plausibility. This section makes it the duty of the persons named in the act, and of their associates, to raise a capital of not less than two hundred thousand dollars; but in what manner this is to be affected, is left to their discretion. It would seem to be the intention of the legislature to give power to admit members before, as well as after the capital was raised; and indeed they might have required the aid of others than those named, to effect this result. I see nothing in the act which forbids this; but I think a fair construction of this part of the charter, shows that this power was intended to be given. If so, this is an argument to show that a moneyed interest is not an indispensable condition of membership.

It is said that the directors have passed a by-law, that every member, who shall cease to be a stockholder, shall cease to be a member. Whether this be so or not, is of little importance; for although the charter gives authority to the directors to admit members, there is none given to disfranchise them. A by-law may modify and change the constitution of a corporation, but can not alter it. It may regulate in a reasonable manner, the exercise of a right in the internal affairs of a corporation, in the conduct of its members, or the mode by which a person is admitted to the exercise of a right to which he has an inchoate title; but it can not take away a right, or impose any unreasonable restraint in the exercise of it: 2 Kyd on Corp. 107, 122.

Rules discharged.

THOMAS v. FOLWELL.

[2 WHARTON, 11.] .

FEME-COVERT HAS NO POWER OF DISPOSITION over her separate estate in Pennsylvania, except such as is given or reserved by the conveyance granting such estate.

POWER TO DEVISE THE ESTATE IS NOT GIVEN to a *feme-covert*, in such a case, by a conveyance to a third person, in trust, to receive the rents and profits and pay the same to her, or to such persons and in such manner as she shall, from time to time, appoint.

CASE stated, in action brought by the guardian of the infant daughter and heir at law of Susan J. Allen, deceased, against the executors of the will of Richard F. Allen, deceased, for the recovery of certain land. It appeared, from the case stated, that on June 1, 1859, Richard F. Allen and Susan J. Allen, his wife, conveyed the premises in fee to one Anthony J. Thomas, in trust "for the only proper use and behoof of the said Susan J. Allen, wife of the said Richard F. Allen, her heirs and assigns forever; and to receive the rents, issues, and profits of the same, and to pay over the same to the said Susan J. Allen, or to such person or persons, and in such manner, as she, the said Susan, shall or may direct, order, and appoint from time to time and at all times hereafter." In March, 1833, Susan J. Allen made her will, whereby, after referring to the deed of trust above mentioned, she provided as follows: "I hereby authorize, empower, and request the said Anthony J. Thomas, trustee as aforesaid, to reconvey and transfer the said property at my decease, or as soon after as is convenient, to my husband, R. F. Allen, or to any other person or persons he may direct, as fully and effectually as I could or might do." Thomas died before the said Susan J. Allen, and she then made an alteration in her will, in which, after referring to the property mentioned in the deed of trust, she devised it as follows: "I hereby give, devise, and bequeath the same to my husband, Richard F. Allen, in fee, and my will and desire is, that the same shall and may be conveyed to him as soon after my decease as may be. And I hereby nominate and appoint William Folwell, jun., of the city of Philadelphia, trustee in the place of Anthony J. Thomas, deceased, to convey the said property to the said Richard F. Allen, in fee simple as aforesaid." She also appointed her husband her executor. Susan J. Allen died, and her husband also died before her will was proved, having previously made a will giving bequests to a number of persons, and devising the residue of his estate to one Shinn. There was no valuable consideration for the trust deed to Anthony J. Thomas, though one was expressed. Richard F. Allen was entirely solvent when the deed was executed, and also at his death. The question was, whether the land passed by the devise in Susan J. Allen, or descended to her daughter and heir.

Holcomb, for the plaintiff.

Brashears, for the defendants.

By Court, GIBSON, C. J. We adhere to *Lancaster v. Dolan*,¹ as an authority unopposed by any other to which we are bound to submit, and as a decision founded in convenience and reason. Either the judgment in that case was right, or the common law which suspends a wife's power over her legal estate is wrong. Her disability under either, is designed to protect her against the husband's power—in the case of a settlement the mischief avowedly deprecated; yet the object is necessarily jeopardized in proportion to the extent of her own power. Why is a settlement ever made? Certainly to exclude the husband's control. But to exclude his direct control, which consists in an exercise of legal power, and yet leave him the means of giving effect to an indirect control, which consists in an exercise of personal influence, is to do nothing. We daily see the incompatibility of the wife's protection with the qualified power of alienation, given her by our statutes; and the English chancery reports show that the same mischief has ensued from the license allowed her under deeds of settlement, by reason of which, what would otherwise have kept the wolf from the door, has been wasted or pirated by the husband. The modern doctrine of courts of equity is founded on what appears to be a misconception of the leading purpose of a settlement, which is obviously to disable the husband, and not to enable the wife, at least further than may be consistent with the security of her title, of which the grantor ought, in the particular case, to be the judge. The object is not so much to give her the dominion of a *feme-sole*, which every man of experience knows would, in a countless number of instances, defeat the principal intent, as to withdraw the estate from the dominion of the husband; and we might expect it to occur to those who are called to the interpretation of these instruments, that the surest way to accomplish this would be to restrain the power of both. The donor has doubtless capacity to remove, by the instrumentality of a trust, the disability annexed to coverture by the common law, so far even as to give the wife the power of a *feme-sole*; and there may be examples of feminine firmness, that would render it safe in particular instances to do so; but it would expose a woman of ordinary resolution to perils from which she would be protected by the common law, the practical wisdom of whose maxims, matured as they are by the experience of a thousand years, no thoroughbred lawyer will hesitate to admit. We therefore hold it to be the settled law of Pennsylvania, that instead of having every

1. 1 Rawle, 231; 8. C., 18 Am. Dec. 626.

power from which she is not negatively debarred in the conveyance, she shall be deemed to have none but what is positively given or reserved to her. By the trust in the present instance, the *feme* had but a power to receive the profits or appoint an agent to do so; and as the freehold did not pass by her appointment in the nature of a will, it descended to her surviving issue.

Judgment for the plaintiff.

POWER OF FEME-COVERT OVER SEPARATE ESTATE IN ABSENCE OF STATUTORY REGULATION.—Some of the most perplexing questions with which courts of equity have had to deal, both in England and in the United States, have been those relating to the wife's "separate estate." With respect especially to the power of the wife over her separate estate, and the extent to which it has modified the common law disability of coverture, there has been a great contrariety of judicial opinion. Speaking upon this point, Mr. Bishop very characteristically says, that "since the confusion of tongues at the tower of Babel, there has been nothing more noteworthy, in the same line, than the discordant and ever-shifting utterances of the judicial mind on the subject;" 1 Bish. Law of Married Women, sec. 847. The decisions in England and America, in relation to this question, are equally conflicting. The conflict in England, however, has been mainly due to a gradual growth, subject to occasional fluctuations, of the doctrine of the wife's complete dominion as a *feme-sole* over her separate estate; while in the United States the difference of opinion seems to have arisen chiefly from the adoption by different states of the views prevailing at different periods in England.

ENGLISH DOCTRINE.—There seems never to have been any doubt in England, that where personal property was settled to the separate use of a *feme-covert*, without any restriction upon her power of disposition, she was to be regarded, with respect to such property, as possessing the same capacity to contract as if she were a *feme-sole*. In other words, she was, by the settlement of such separate property to her use, clothed with the absolute *jus disponendi* incident to ownership, and which is peculiarly necessary to the enjoyment of property in chattels: *Peacock v. Monk*, 2 Ves. sen. 190; *Hearle v. Greenbank*, 1 Id. 301; *Hulme v. Tenant*, 1 Bro. C. C. 16; S. C., 1 Lead. Cas. in Eq. (4th Am. ed.) 679 and note; *Fettiplace v. Gorges*, 1 Ves. jun. 46; S. C., 3 Bro. C. C. 8; *Wagstaff v. Smith*, 9 Ves. 520; *Rich v. Cockell*, Id. 369; *Thackwell v. Gardiner*, 5 De G. & S. 58; *Hodgson v. Hodgson*, 2 Keen, 704; *Caton v. Rideout*, 1 Mac. & G. 599; *Hanchett v. Briscoe*, 22 Beav. 496; *Lechmere v. Brotheridge*, 32 Id. 353; *Humphrey v. Richards*, 2 Jur. (N. S.) 432; *Newcomen v. Hassard*, 4 Ir. Ch. 268. So in case of a reversionary interest in chattels: *Sturgis v. Corp*, 13 Ves. 189. And this power may be exercised either by an act *inter vivos*, or by will (see the note to *Hulme v. Tenant*, 1 Lead. Cas. in Eq. (4th Am. ed.) 685); and may be made use of to bestow the property upon the husband himself. Thus where stock is settled to a wife's separate use, she may give the dividends to her husband; and such a gift may be implied from her permitting him, from time to time, to draw the money and use it as his own: *Caton v. Rideout*, 1 Mac. & G. 599.

The same power of disposition has always been recognized as existing with respect to the rents and profits of realty settled to the wife's separate use, and to leasehold interests and life estates in realty, etc.: *Hulme v. Tenant*, 1 Bro. C. C. 16; S. C., 1 Lead. Cas. in Eq. (4th Am. ed.) 679; *Wainwright v.*

Hardisty, 2 Beav. 363; *Stead v. Nelson*, Id. 245; *Lechmere v. Brotheridge*, 32 Id. 361; *Newcomen v. Hassard*, 4 Ir. Ch. 268; *Willcocks v. Hannington*, 5 Id. 33; *Major v. Lansley*, 2 Russ. & M. 355. In the early English cases, however, it was denied that a wife during her coverture could by will or by any act *inter vivos*, other than a fine or recovery, or by a deed duly acknowledged, under the fines and recoveries act, after that act was passed, dispose of land settled to her separate use in fee, so as to bind her heir: *Peacock v. Monk*, 2 Ves. sen. 190; *Newcomen v. Hassard*, 4 Ir. Ch. 268; *Harris v. Mott*, 14 Beav. 169; *Lechmere v. Brotheridge*, 32 Id. 353; *Doe v. Scott*, 4 Bing. 505. In *Lechmere v. Brotheridge*, 32 Beav. 353, Sir John Romilly, master of the rolls, speaking on this subject, says, that an acknowledgment under the fines and recoveries act is necessary to convey such an estate, because the donor or settler can not repeal the law, and he expresses his disapproval of *Adams v. Gamble*, 12 Ir. Ch. 102, in which a contrary doctrine was held.

The later decisions in England have removed this limitation of the doctrine that a *feme-covert* is to be deemed a *feme-sole* as to her power over her separate estate, and have determined that a wife may dispose of realty settled to her separate use in fee, without the concurrence of her husband, either by will or by a conveyance *inter vivos* not acknowledged under the fines and recoveries act: 1 Bish. Law of Married Women, sec. 852; *Hulme v. Tenant*, 1 Lead. Cas. in Eq. (4th Am. ed.) 686, note; *Taylor v. Meads*, 34 L. J. Ch. (N. S.) 203; *Pride v. Bubbs*, L. R., 7 Ch. App. 64; *Hall v. Waterhouse*, 11 Jur. (N. S.) 361; S. C., 5 Giff. 64; 13 W. R. 666. In *Pride v. Bubbs*, L. R., 7 Ch. App. 64, Lord Chancellor Hatherley says: "It can not, I apprehend, be now disputed that when a woman is the owner of real estate to her separate use she is, to all intents and purposes, in the position of a *feme-sole*, so as to be able to dispose of that estate by will or deed."

The leading case on this subject is *Taylor v. Meads*, 34 L. J. Ch. (N. S.) 203. In that case, a *feme-covert* had an equitable estate in fee settled to her separate use in default of an appointment under a power. She devised the estate to her husband by a will executed in accordance with the wills act, but not sealed so as to constitute a valid execution of the power of appointment contained in the instrument of settlement. Lord Chancellor Westbury held the devise good. After discussing another point in the case, he said: "This gives rise to the next question, upon which there has been no decision in the court below: namely, whether, in a case where legal estates are conveyed or devised to trustees in fee, upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme-sole*. Can she convey the equitable fee without the necessity for the instrument being acknowledged in the manner required by the statute for the abolition of fines and recoveries? And can she, during coverture, devise the equitable estate by a will executed in conformity with the statute? There is no difficulty as to the principle. When the courts of equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme-sole*. It is of the essence of the separate use, that the married woman shall be independent of, and free from the control and interference of her husband. With respect to separate property, the *feme-covert* is, by the form of the trust, released and freed from the fetters and disabilities of coverture, and invested with the rights and powers of a person who is

sui juris. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation, and accordingly the right of a *feme-covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord Thurlow devised the clause against anticipation: See *Parkes v. White*, 11 Ves. 209, 221. But it would be contrary to the whole principle of the doctrine of separate use, to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole matter lies between a married woman and her trustees; and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees, to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme-sole's* equitable interest. When the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity." Further on in his opinion the lord chancellor says: "This brings us to the decided cases, in which there is some inconsistency, but they preponderate greatly in favor of the proposition that a *feme-covert*, when not restrained from alienation, has in equity the same *jus disponendi* over her separate estate by deed or will, as she would have if free from the disability of coverture. In addition to *Peacock v. Monk* [2 Ves. sen. 190], and the well-known decision of Lord Thurlow, it is sufficient to refer to *Tullett v. Armstrong* [1 Beav. 1; S. C., 4 Myl. & Cr. 377, 390; 5 L. J. Ch. (N. S.) 303; 8 Id. 19; 9 Id. 41], and *Baggett v. Meux* [1 Ph. 627; S. C., 15 L. J. Ch. (N. S.) 262], the judgment of Lord Justice Turner in *Atcheson v. Le Mann*, 23 L. T. 302, and finally to the recent case of *Adams v. Gamble* [11 Ir. Ch. 269; S. C., 12 Id. 102], in the court of appeal in Ireland, where the point was expressly determined." In conclusion on this point, he says: "I must hold, therefore, that a *feme-covert*, not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* or will."

So far as the debts of the wife are concerned, it is settled in England that, as a necessary incident of her power of disposition over her separate estate, where it is not otherwise provided in the deed of settlement, debts contracted for the benefit of the estate, or with reference to it, or upon the credit of it, may be made a charge upon such estate by appropriate proceedings in equity, and that the fact as to whether or not they were so contracted is to be judged of from all the circumstances of the case: *Johnson v. Gallagher*, 3 De G. F. & J. 494; S. C., 30 L. J. Ch. (N. S.) 298; 7 Jur. (N. S.) 273. Bonds, bills, and notes executed by a *feme-covert* are chargeable upon her separate estate: *Hulme v. Tenant*, 1 Bro. C. C. 16; S. C., 1 Lead. Cas. in Eq. (4th Am. ed.) 679 and note; *Norton v. Turvill*, 2 P. Wms. 144; *Stanford v. Marshall*, 2 Atk. 68; *Peacock v. Monk*, 2 Ves. sen. 190; *Dillon v. Grace*, 2 Sch. & Lef. 456; *Heatley v. Thomas*, 15 Ves. 596; *Bullpin v. Clarke*, 17 Id. 365; *Field v. Sowle*, 4 Russ. 112; *Stuart v. Kirkwall*, 3 Madd. 387; *Owen v. Homan*, 4 H. L. Cas. 997; *McHenry v. Davies*, L. R., 6 Eq. 462; S. C., 10 Id. 88. And indeed the general personal engagements and contracts of a wife, whether in writing or not, are thus chargeable: *Johnson v. Gallagher*, 3 De G. F. & J. 494; S. C., 30 L. J. Ch. (N. S.) 298; 7 Jur. (N. S.) 273; *Owens v. Dickenson*, Cr. & Ph. 48; *Matheuman's case*, L. R., 3 Eq. 787. In the case last cited, *Kindersley, V. C.*, adopts on this subject the doctrine of Turner, L. J., in *Johnson v. Gallagher*, which the learned vice-chancellor thus states: "If a married woman having separate property enters into a pecuniary engage-

ment, whether by ordering goods or otherwise, which, if she were a *feme-sole*, would constitute her a debtor, and, in entering into such engagement, she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner I have mentioned must depend upon the facts and circumstances of each particular case. It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract, expressly making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be held liable to satisfy the obligation."

There has been in the English courts considerable discussion of the question whether a married woman's pecuniary obligation, written or verbal, should be made a charge in equity upon her separate estate, when not expressly so charged in the contract, on the ground that by entering into such a contract she is to be presumed to intend to charge her separate estate, or because, having the power of a *feme-sole* in equity in such cases, she is also to be deemed liable as a *feme-sole*, with respect to her separate estate, for engagements contracted for her own benefit or that of her estate. Since, however, both views ultimately lead practically to the same conclusion, such a discussion seems to be speculative rather than useful. It is not our purpose in this note to enter at large into an examination of the vast array of English decisions respecting the liability of a married woman's separate estate for her debts or contracts, the subject which we have in hand being simply the power, and not the liability, of a *feme-covert* with respect to her separate estate. We refer to these cases merely to illustrate the extent to which the English courts have carried the doctrine that a married woman is to be regarded in equity as a *feme-sole* as to her separate estate when not otherwise provided in the deed of settlement. The whole subject is exhaustively discussed in the note to *Hulme v. Tenant*, 1 Lead. Cas. in Eq. (4th Am. ed.) 684. The early English cases are reviewed also in *Ewing v. Smith*, 5 Am. Dec. 557, and *Jaques v. Methodist Episcopal Church*, 8 Id. 447.

AMERICAN CASES ON THIS SUBJECT.—The diversity of adjudications in the American courts respecting the power of a *feme-covert* over her separate estate is so great that it is exceedingly difficult to give a clear and connected view of the opinions entertained upon this subject in the several states. The difficulty has been not a little increased also by the innovations introduced by the laws relating to what may be termed the "statutory separate estate" of married women, and the failure on the part of some courts to distinguish clearly between this class of property and the separate estate in equity. The only practicable course seems to be to take up the states in order, and to show the views entertained in each. It may be laid down in general terms, however, that the prevalent American doctrine on this subject is in substantial accord with that of the English courts.

The Alabama cases adopt the English doctrine on this subject nearly, if not quite, to its full extent. They hold that a married woman has, as an in-

cident of her separate estate, in equity, the power of aliening or incumbering it as if she were *sole*, unless restrained by the instrument under which she holds it, and that she may therefore charge it with her own or her husband's debts, either expressly or by implication: *Collins v. Rudolph*, 19 Ala. 616; *Collins v. Lavenberg*, Id. 682; *Hooper's Ex'r v. Smith*, 23 Id. 643; *Jenkins v. McConnico*, 26 Id. 213; *Caldwell v. Sawyer*, 30 Id. 283; *Paulk v. Wolfe*, 34 Id. 541; *Gunter v. Williams*, 40 Id. 561; *McMillan v. Peacock*, 57 Id. 127; *Helmetag v. Frank*, 61 Id. 67. And an intention on her part to charge her separate estate will be presumed from her giving a note or other written obligation: *Collins v. Lavenberg*, 19 Id. 682; *Osley v. Ikelheimer*, 26 Id. 332. So where she joins with her husband in giving a note for the purchase of a chattel: *Caldwell v. Sawyer*, 30 Id. 283. So where she acknowledges an account for medical services rendered to her: *Collins v. Rudolph*, 19 Id. 616.

In Arkansas a *feme-covert* may charge her separate estate by a contract made with direct reference to it or for its benefit or her own: *Dobbin v. Hubbard*, 17 Ark. 189; *Stillwell v. Adams*, 29 Id. 346; *Buckner v. Davis*, Id. 444. But a wife's separate estate in realty can not be sold to satisfy such a charge, but only the rents and profits can be applied: *Palmer v. Rankins*, 30 Id. 771.

The Connecticut doctrine is, that a married woman has full power of disposition over her separate estate as if she were a *feme-sole*, unless restrained by the instrument creating the estate: *Inlay v. Huntington*, 20 Conn. 146. Where she enters into a contract for the benefit of her estate or for her own benefit, it will be presumed, in the absence of evidence to the contrary, that the debt was contracted upon the credit of her estate: *Hitchcock v. Kiehl*, 41 Id. 611; *Donovan's appeal*, Id. 551. So under the statute of 1872: *Williams v. King*, 43 Id. 569. The expenses of a divorce suit brought by her may also be made a charge upon her separate estate: *Cooke v. Newell*, 40 Id. 596.

The same absolute power of disposition exists in Florida, unless restricted by the instrument creating the estate, or such instrument prescribes a particular mode of alienation: *Maiben v. Bobe*, 6 Fla. 381. A wife may pledge her separate property for a debt, but in order to charge it upon the estate, her trustee must be a party to the bill: *Lewis v. Yale*, 4 Id. 418.

The rule in Georgia is, that a *feme-covert* has absolute power of disposition in such a case, unless restrained by the deed under which she holds, but that if a particular mode of alienation is prescribed, it must be followed: *Wyllly v. Collins*, 9 Ga. 223; *Weeks v. Sego*, Id. 199; *Fears v. Brooks*, 12 Id. 195; *Dallas v. Heard*, 32 Id. 604. The note of a married woman may be charged upon her separate estate in equity: *Dallas v. Heard*, *supra*. But not where she executes the note as surety for her husband or another: *Saulsbury v. Weaver*, 59 Ga. 254; *King v. Thompson*, Id. 380.

The same doctrine prevails in Illinois as in Georgia, it seems, as to the power of alienation or incumbrance: *Swift v. Castle*, 23 Ill. 209; *Pomeroy v. Manhattan Life Ins. Co.*, 40 Id. 398; *Conkling v. Doull*, 67 Id. 355. Attorney fees in a divorce suit brought by a wife are not chargeable upon her separate estate where there is no evidence that she undertook to make them a charge, and there is evidence that the attorney relied upon the husband for payment: *Pfirsching v. Fulsh*, 87 Id. 260.

A married woman in Indiana can not, under the statute, convey or incumber her separate estate, except by deed: *American Ins. Co. v. Avery*, 60 Ind. 566; *Richards v. O'Brien*, 64 Id. 418. A note for an insurance upon the property, not being for the betterment of the estate, can not be enforced against it: *American Ins. Co. v. Avery*, 60 Id. 566. Nor can a note made expressly payable out of the separate property, be enforced against the rents and profits thereof: *Richards v. O'Brien*, 64 Id. 418.

The *jus disponendi* of a *feme-covert* over her separate estate exists in Kansas, it seems, to the fullest extent. She may bind her separate estate by a note executed for her husband's debt, though not expressly charged: *Deering v. Boyle*, 8 Kan. 525; S. C., 12 Am. Rep. 480. And an allegation in her answer, that she did not charge her estate with a note executed by her, is no defense: *Wicks v. Mitchell*, 9 Kan. 80.

It is held, in Kentucky, that a *feme-covert* may deal with her separate estate as a *feme-sole*, in the absence of any restraint in the instrument creating the estate, and that equity will subject such estate to the payment of any debts which she may execute on the faith of it: *Lillard v. Turner*, 16 B. Mon. 374; and the execution of a note by her is deemed sufficient evidence of an intent to charge her separate estate: *Jarman v. Wilkerson*, 7 Id. 293; *Bell v. Kellar*, 13 Id. 381; *Lillard v. Turner*, 16 Id. 374; *Burch v. Breckinridge*, Id. 482. Her general engagements will not authorize a charge upon her separate estate: *Coleman v. Wooley's Ex'r*, 10 Id. 320. But where she is living apart from her husband, a debt contracted for the employment of counsel to defend her son from a charge of crime, is such a meritorious claim that equity will charge it upon her estate: Id.

In Maryland a *feme-covert* has, as to her separate estate, absolute power of disposition, unless restrained by the deed of settlement; but if a mode of alienation or appointment is provided for in the instrument, it is exclusive, and must be followed: *Cooke v. Husbands*, 11 Md. 492. But her engagements are not chargeable against her estate, unless they appear affirmatively to have been contracted with reference to it, and to have been intended to be so charged: *Koontz v. Nabb*, 16 Id. 549; *Wilson v. Jones*, 46 Id. 349.

The doctrine adopted in Mississippi, at a comparatively early period, was in accordance with that laid down in the principal case, that a *feme-covert* was a *feme-sole* as to her separate estate only, so far as she was constituted such by the instrument conferring the estate, and she was restricted to the mode of alienation pointed out by such instrument: *Doty v. Mitchell*, 9 Smed. & M. 435; see also *James v. Fisk*, Id. 144. But prior to the code of 1857, a married woman could bind the *corpus* of her separate estate for her husband's debt, by a deed of trust or mortgage executed by herself and husband in conformity with the statute: *James v. Fisk*, *supra*; *Seasons v. Bacon*, 23 Miss. 272; *Armstrong v. Stovall*, 26 Id. 275; *Russ v. Wingate*, 30 Id. 440; *Stone v. Montgomery*, 35 Id. 83; *Dibrell v. Carlisle*, 48 Id. 691.

Missouri has gone fully as far as any of the states above named in the adoption of the English doctrine upon this subject. A married woman in that state has absolute power of disposition over her separate estate, unless specially restrained by the instrument creating the estate; nor is she restricted to a particular mode of disposition pointed out in the instrument: *Coats v. Robinson*, 10 Mo. 757; *Whitesides v. Cannon*, 23 Id. 457; *Segond v. Garland*, Id. 547; *Schafroth v. Amos*, 46 Id. 114; *Kimm v. Weippert*, Id. 532; S. C., 2 Am. Rep. 541; *Miller v. Brown*, 47 Mo. 504; S. C., 4 Am. Rep. 345; *Metropolitan Bank v. Taylor*, 62 Mo. 338. She may therefore bind the estate by charging it with her own or her husband's debts, and an intent to charge it will be presumed from the execution of a note, or other written contract, by her: *Coats v. Robinson*, 10 Id. 757; *Whitesides v. Cannon*, 23 Id. 757; *Schafroth v. Amos*, 46 Id. 114; *Metropolitan Bank v. Taylor*, 62 Id. 338; *Morrison v. Thistle*, 67 Id. 596. The presumption of such an intent may be rebutted by the instrument itself, but not by parol: *Metropolitan Bank v. Taylor*, 62 Id. 338. An account for goods furnished on the wife's credit under a verbal agreement with her, will be regarded as impliedly intended to

be charged on her separate estate, even though the goods are necessaries, which her husband is legally bound to furnish: *Müller v. Brown*, 47 Id. 504; S. C., 4 Am. Rep. 345. It is to be noted, however, that though a wife's contract may be charged on her separate property by proper proceedings, it does not, of itself, constitute a lien upon the property: *Nash v. Norment*, 5 Mo. App. 545.

In New Jersey it has been determined that a *feme-covert* may dispose of her separate estate as a *feme-sole* unless such power is inconsistent with the terms of the instrument under which she received the estate; but a particular mode of disposition pointed out in such instrument is exclusive: *Leaycraft v. Heiden*, 3 Green Ch. 512. A debt contracted for the benefit of her estate or of herself, will be charged thereon: *Armstrong v. Ross*, 5 C. E. Green, 109. But an accommodation note or indorsement is not sufficient to create such a charge: *Peake v. La Baw*, 6 Id. 269. Nor can a *feme-covert* charge her separate estate by a contract of suretyship, except in consideration of a benefit to herself or to her estate: *Perkins v. Elliott*, 8 Id. 526.

It was settled in New York in the leading case of *Jaques v. Methodist Episcopal Church*, 8 Am. Dec. 447, overruling the opinion of Chancellor Kent in the court below, that a *feme-covert* is as to her separate estate a *feme-sole*, and may dispose of it without the concurrence or consent of her trustee, unless specially restrained by the instrument of settlement; that a particular mode of disposition prescribed in the instrument is not exclusive of other modes, unless declared to be so; and that a wife may charge her estate with debts if she clearly indicate an intention to do so at the time of creating the debt. The husband's assent to a conveyance by the wife of her separate estate by mortgage or otherwise, was declared to be unnecessary in *Firemen's Ins. Co. v. Bay*, 4 Barb. 407, and *Powell v. Murray*, 2 Edw. Ch. 636. The wife may bequeath the savings of her separate estate: *Rieben v. White*, 43 Barb. 92. In *Vanderheyden v. Mallory*, 1 N. Y. 452, it was decided that a debt contracted by a *feme-covert* either for herself or for her husband, was *prima facie* an appointment of her separate property for its payment. It is now settled, however, in that state, by the case of *Yale v. Dederer*, 18 Id. 265; S. C., 22 Id. 450; 68 Id. 329, that a wife's separate estate is not chargeable with the payment of a debt contracted by her, except where it is contracted for the benefit of the estate, unless the intent to make it a charge appears on the face of the contract: *Manhattan Brass etc. Co. v. Thompson*, 58 Id. 80; *Gosman v. Cruger*, 69 Id. 87; *Eisenlord v. Snyder*, 71 Id. 45; *Weir v. Groat*, 4 Hun, 193; *Baker v. Harder*, Id. 272; *Johnston v. Peugnet*, 17 Id. 540. Where such intent is expressed in the contract, the estate is chargeable though the contract is by parol: *Mazon v. Scott*, 55 N. Y. 247. It is held, in *Conlin v. Cantrell*, 64 Id. 217, that where a wife is living apart from her husband, a specific agreement to charge her separate estate with the payment of a debt contracted by her is unnecessary, but that an intent to make it a charge may be inferred from the surrounding circumstances. The doctrine of *Yale v. Dederer* does not apply to debts contracted for the benefit of the estate. It need not, in such a case, appear from the face of the contract or otherwise, that it was intended to charge the estate with the payment of the debt, for the estate will in any event be subjected to a charge for its payment: *Dyett v. North American Coal Co.*, 20 Wend. 570; *Gardner v. Gardner*, 22 Id. 526; *Owen v. Cawley*, 42 Barb. 105; *Kelty v. Long*, 4 N. Y. Sup. Ct. (T. & C.) 163; S. C., 1 Hun, 714; *Weir v. Groat*, 4 Id. 195.

In North Carolina it has been determined that a *feme-covert* can not dispose of lands conveyed to her separate use in any other manner than that

prescribed by law for the conveyance of lands by *femes-covert*, unless such power of disposition is expressly given by the instrument conferring the estate, but that she has an absolute *jus disponendi* as to separate personal estate in the same manner as if she were a *feme-sole*: *Newlin v. Freeman*, 4 Ired. Eq. 312; *Harris v. Harris*, 7 Id. 111. Her separate estate may be charged in equity with the payment of debts contracted with the express or implied understanding that they are to be paid out of it: *Frazier v. Brownlow*, 3 Id. 237. But her separate estate is not liable for her personal contracts which are not specifically charged on the property: *Knox v. Jordan*, 5 Jones Eq. 175; *Felton v. Reid*, 7 Jones Law, 269.

In Ohio the courts seem to have vacillated somewhat in their positions on some branches of this subject. It is now established, however, that a *feme-covert* may charge her separate property with debts contracted for its benefit or her own, or on the credit of the estate, and that an intent to charge may be express or may be implied from her giving a note, bill, or bond, etc., for the debt: *Machir v. Burroughs*, 14 Ohio St. 519; *Phillips v. Graves*, 20 Id. 371; S. C., 5 Am. Rep. 675; *Rice v. Railroad Co.*, 32 Ohio St. 380. So where she executes a note as surety for her husband, or for a stranger: *Williams v. Urmston*, 35 Id. 296, overruling *Levi v. Earl*, 30 Id. 147, referred to in the note to *Ewing v. Smith*, 5 Am. Dec. 589. And in case a debt is so chargeable, equity will subject to its payment: 1. Her separate personalty; 2. The income of her separate realty; 3. The *corpus* of such realty: *Phillips v. Graves*, 20 Ohio St. 371; S. C., 5 Am. Rep. 675. In the first of the cases above mentioned, *Machir v. Burroughs*, 14 Ohio St. 519, the court manifested a decided inclination in favor of the doctrine of the principal case on this subject.

The courts of Pennsylvania, Tennessee, and South Carolina have all adopted the doctrine that a *feme-covert* has no power of disposition over her separate estate, except such as is conferred in the instrument creating the estate, and that where a particular mode of alienation is prescribed, it is exclusive unless expressly declared not to be so: *Ewing v. Smith*, 5 Am. Dec. 557, and other South Carolina cases cited in the note thereto; *Lancaster v. Dolan*, 18 Id. 625; *Dorrance v. Scott*, 3 Whart. 309; *Stahl v. Crouse*, 1 Pa. St. 111; *Rogers v. Smith*, 4 Id. 93; *Wright v. Brown*, 44 Id. 224; *Maurer's appeal*, 86 Id. 380; *Morgan v. Elam*, 4 Yerg. 375; *Ware v. Sharp*, 1 Swan, 489; *Marshall v. Stephens*, 8 Humph. 159; *Sitton v. Baldwin*, Id. 209; *Kirby v. Miller*, 4 Coldw. 4. Notwithstanding this strictness of doctrine, however, it was early determined in South Carolina that a married woman's separate estate was chargeable with debts contracted for its benefit: *Cater v. Eveleigh*, 6 Am. Dec. 596; *James v. Mayrant*, Id. 630.

It was decided in Rhode Island, in *Metcalf v. Cook*, 2 R. I. 355, in accordance with the doctrine held in Pennsylvania, South Carolina, and Tennessee, that a *feme-covert* had only such power of disposition over her separate estate as was expressly granted in the instrument conferring the estate; but the recent case of *Elliot v. Gower*, 12 Id. 79; S. C., 34 Am. Rep. 600, seems to have departed somewhat from that position. It was there determined that a married woman may charge her separate estate either by a written or by an oral contract which is for the benefit of herself or of her estate.

In Texas, lands belonging to a married woman, generally are termed her "separate estate," and she has in equity all the power of disposition with respect to them which could be conferred by the amplest deed of settlement: *Slaughter v. Glenn*, 98 U. S. (8 Otto) 242, and cases cited.

The established doctrine in Virginia and West Virginia is, that a *feme-*

covert has full power of disposition over her separate personal estate, and the rents and profits of her separate real estate, but that this power does not extend to the *corpus* of her separate real estate, as to which she still remains under the common law disability of coverture: *West v. West*, 3 Rand. 373; *Vizonneau v. Pegram*, 2 Leigh, 183; *Woodson v. Perkins*, 5 Gratt. 346; *Nixon v. Rose*, 12 Id. 425; *Penn v. Whitehead*, 17 Id. 503; *Burnett v. Hawpe's Ex'r*, 25 Id. 481; *Frank v. Lilienfeld*, 33 Id. 377; *Patton v. Merchants' Bank of Charleston*, 12 W. Va. 587; *Radford v. Carwile*, 13 Id. 572; *Weinberg v. Bempe*, 15 Id. 829. So far as her power of disposition extends, she may charge the property with her own or her husband's debts, or give it to him, if she pleases: *Burnett v. Hawpe's Ex'r*, 25 Gratt. 481. And where she gives a note or bond for such debt, without referring to her separate estate, it will nevertheless be decreed to be a charge thereon: *Radford v. Carwile*, 13 W. Va. 572. The opinion of Green, president, in the case last cited, contains an exhaustive review of the English and American cases on this subject, extending over more than a hundred pages of the report.

It has recently been determined in the District of Columbia that a *feme-covert* may dispose of her separate estate as she pleases, as if she were a *feme-sole*, unless her power is restricted by the instrument under which she holds, and that a provision in the instrument, that the trustee shall join in a deed executed by her, does not apply to a devise: *Smith v. Thompson*, 2 McArth. 291; S. C., 29 Am. Rep. 621.

For a further discussion of this topic, particularly with respect to the liability of a married woman's separate estate for her debts and contracts, see the note to *Ewing v. Smith*, 5 Am. Dec. 589.

DEWAR v. SPENCE.

[2 WHARTON, 211.]

OMISSION OF THE SHERIFF TO SIGN THE RETURN OF A WRIT, renders such return irregular.

MISRETURN OR AN IRREGULAR RETURN IS AMENDABLE, but it is otherwise where there is no return, which renders the subsequent proceedings void.

ACT OF 1806 CURES ALL MATTERS OF FORM in actions real, personal, and mixed.

UNDESIGNED INDORSEMENT ON A SUMMONS IN PARTITION of "*nihil habet*, and published as the law directs," when returned into the prothonotary's office, which is referred to in a subsequent part of the record as the sheriff's return, is an insufficient return, and is amendable, and a judgment by default founded thereon is not void.

PLAINTIFF IN PARTITION MAY BE PERMITTED TO TAKE THE LAND at the valuation, after a judgment by default against non-resident defendants, and the court is not bound to order a sale.

ERROR to the district court, for the city and county of Philadelphia, in a suit for partition. It appeared that defendants resided in Scotland and Wales, respectively, at the institution of the suit. The writ of summons was issued to June term, 1828, and was afterwards returned into the prothonotary's office indorsed: "*Nihil habet*, and published as the law directs." This

indorsement was unsigned. Judgment by default was rendered, and a writ of partition in December, 1828. The sheriff made a return to the writ, to the effect that with a jury of good and lawful men he had gone in person to the premises, and that the jurors, upon their oaths, said the premises could not be divided without injury, and the sheriff therefore valued and appraised the premises at a certain sum. This valuation was subsequently confirmed by the court upon a rule to show cause, and the plaintiff was permitted to take the property at the valuation. In June, 1835, Mrs. Dewar, one of the defendants, moved for a rule to show cause why the judgment and proceedings in partition should not be set aside, because the summons had not been served on her or notice given to her of the institution of the suit, or of the writ of partition or its execution, and because there was no return of the summons, and the default was therefore irregular; and on the further ground that the property was capable of division; that the valuation was too low; that it was error to permit the plaintiff to take it at the valuation without notice to the other parties, and that the plaintiff, knowing the defendant's residence, and being in correspondence with her, had purposely concealed his proceedings from her, and given her no notice thereof. The motion was supported by an affidavit of the defendant, to the effect that, though she was at the time corresponding with the plaintiff, he did not inform her of the suit; and that she never had any notice thereof until after the proceedings were concluded. There was an entry in the record dated June 15, 1836, to the effect that in 1836 the sheriff had signed his name to the return to the summons, supposing that to be the proper course, but that it was agreed by the parties that such signing be the same as if it had never been done. On the hearing, the rule to show cause why the partition proceedings and judgment should not be set aside, was discharged, and the defendant, Mrs. Dewar, brought this writ of error. The errors assigned were the same in substance as the grounds for the motion for the rule to show cause.

Williams, for the plaintiff in error.

Meredith and James S. Smith, contra.

By Court, ROGERS, J. At the common law, it was not usual to put the sheriff's name to returns; for when a writ was returned, it was intended to be by the officer of the court whose duty it was to make it; and for this reason it was held that

such omission was not erroneous: *Egerton v. Morgan*, 1 Bull. 73; *Scroggs v. Spencer*, Cro. Eliz. 704. But by the statute of 12 Edw. II., c. 5, it was provided, that from thenceforth "sheriffs and other bailiffs that receive the king's writs, returnable in his court, shall put their names with the returns, so that the court may know of whom they took such returns, if need be; and if any sheriff or other bailiff leave out his name in his return, he shall be grievously amerced to the king's use." It is not very clear what was the specific evil of which complaint was made in parliament, which produced the statute of Edward, but the probability is, that it arose from the fact that in some counties there were two or more sheriffs, appointed in different modes, and of whose appointments no certain record was made; for it must be remarked that the statute does not extend to coroners, who are elected, and about whose appointment no uncertainty exists. It appears by the report of the judges, that that part of the statute of Edward is in force in this state, which obliges the sheriff and other officers to sign their names to the return of writs. The first question raised by the plaintiff in error, depends upon the construction of this statute, and mainly rests on its authority. It is contended that the omission of the sheriff to sign his name to his return, renders the proceedings void; whilst on the other hand, it is insisted that it is erroneous merely, and amendable, and that the sheriff, in the language of the statute, shall be grievously amerced. And on this point, it is very clear that the distinction is taken in all the authorities which have been cited, between the return of the writ *album breve*, which is no return at all, and an insufficient or misreturn. In the former it is void; but in the latter it is erroneous, and as such is amendable, either at the common law or by the statutes of amendments; *Stainer v. James*, Cro. Eliz. 311; *Young v. Wilson*,¹ Id. 309. The point, therefore, is, whether this falls within the former or latter class of cases.

In *Dalton*, it is said, that where the sheriff or other officer returns a writ, he ought always to indorse his name on the writ, otherwise it is an incurable error, and it has been so adjudged (although it has been objected, that in case of a *distingas* or *venire*, which are judicial processes, it may be amended); for as the court there observed, the sheriff's name not being to it, it is no return. But in *The Queen v. The Archbishop of Canterbury*, 1 Leon. 139, the law is ruled otherwise. The case was this: The queen brought a *quare impedit* against

1. *Young v. Watson*.

the archbishop of Canterbury, the bishop of Chichester, and the incumbent, and counted that Ashburton was seised of the advowson; and that he was outlawed in an action personal, at the suit of such a one, and showed the whole outlawry certain. An exception was taken to the count, because in setting down the outlawry, the process is alleged to be returned by the sheriff, but the name of the sheriff is not there expressed. And as to that, it was agreed by the court, that the truth is, that it is provided by the statute 12 Edw. II., c. 5, that the sheriffs in their returns, put the names to their returns; but it is not required so to plead it, for the omitting thereof doth not make the record void, but the sheriff shall be amerced. And in *Dalston v. Thorp*, Cro. Eliz. 767, which was error of a judgment in the court of common pleas, in debt, upon an escape, the error assigned was, for that the original writ had not the sheriff's name to the return thereof, according to the statute of York, 12 Edw. II.; and for this cause it was moved that it was error, and the judgment reversible. But in regard the defendant had appeared, and the plaintiff had counted against him upon the record of the recovery, and the defendant had pleaded *nul tiel record*, it was holden not to be material, although the writ had not been returned; for he shall never take advantage (after appearance and pleading) of such misprision, nor of the mis-awarding of mesne process; wherefore judgment was affirmed. In the latter case, unlike the case in *Leonard*, the point is not directly decided, but the court put the omission on the ground of a misprision, which is always amenable. These decisions we consider to be the better authority, because they are more in accordance with the spirit and intention of the act, than the opinion intimated in *Dulton*.

The statute was intended, as is stated in the act itself, to remedy an inconvenience which had arisen from the omission on the part of the sheriffs, to put their names with their returns, so that, if need be, the court did not know by whom the returns were made; for remedy whereof the statute provides, that the sheriff who is in default shall be grievously amerced; but it is nowhere intimated, nor did the mischief which the statute designed to remedy require it, that the return on account of such omission, should be void. Such a construction would sometimes operate with great severity on parties and innocent purchasers, who are in no default, who would be bound to a critical examination of sheriffs' returns; a practice which has never been thought necessary in this state, and on which many

titles may depend. It was required at common law, and is equally necessary since the statute, that a return should be made by the sheriff, or by some person in his name; and for this reason it has been held, that returns *album breve*, that is to say, where the writ has never been in the hands of the sheriff, or where he has refused or neglected to return it, are void; but this is not so, where a return has been actually made, either before or since the statute. The plaintiff in error has cited *Rowland's case*, 5 Co. 41; *Stainer v. James*, Cro. Eliz. 311; *Young v. Wilson*, Id. 309; *Wears v. Woodliff*, Id. 466, and *Rogers v. Smith*, 28 Eng. Com. L. 204; and in all of them, as well as in the cases cited by the defendant in error, a distinction is taken between a return of a writ *album breve*, and an insufficient or misreturn. The court put them on the ground, that they are returns *album breve*, and it is conceded that if they were insufficient returns, they would be erroneous and amendable.

This was a judgment by default, and if there was no return made by the sheriff of the writ, it would be the duty of this court to reverse the proceedings; but if a return was made, although deficient in this requisition of the statute, no such necessity is imposed upon us. Without insisting on the statutes of jeofails we are of the opinion that the act of 1806, is sufficiently comprehensive to embrace this case. That act is highly remedial, and has been applied to cases, which although not within its letter, are within its spirit, and has been ruled to cure all matters of form, in actions real, personal, or mixed. Thus amendments have been made in ejectment, and what perhaps is still more pertinent, in an assize of nuisance, which is a real action: *Barnet v. Ihrie*, 17 Serg. & R. 174. But did the sheriff make a return of his writ? Of this we have no doubt. The return is usually made on the back of the writ, but this is not absolutely necessary. The statute requires that the name of the sheriff shall be put with the return. On the back of the writ, which is regularly filed in the proper office, we have this indorsement made by legal intendment, by the sheriff himself, or by his authority, "*Nihil habet*, and published as the law directs;" and in another part of the record, which we are not at liberty to disregard, because it is returned with the record and forms part of it, we find this entry: "And now the sheriff of Philadelphia county makes return to said writ, *nihil habet*, and published as the law directs." Now although the return is not according to the form prescribed, yet sufficient appears to show, that, in truth, a return was made to the court

of the service of the writ by an officer, having authority to make the return. In addition to this, this return is recognized by the sheriff himself; for to the writ *de partitione facienda*, he returns that he went, in his proper person, to the premises, and that the parties to the same were severally warned. We can not, therefore, avoid the conclusion that a return was made of the service of the writ, and from this it results that this was an insufficient or misreturn, which is amendable.

It is further contended, that the court erred in permitting Andrew B. Spence, the plaintiff in partition, to take the property at the valuation. It is said that the court should have ordered a sale. But I can not perceive what power the court would have, under the circumstances of this case, to decree a sale; for this can be done only where none of the parties agree to take the land at the valuation; and the order, by the express directions of the act, must be at the instance of the demandant himself. But here one of the parties, the demandant himself, so far from applying for an order of sale, prays the court that he may be permitted to take the property at its appraised value. If, then, the court were in error in adjudging the property to him, it follows that the proceedings in partition must end, when one or more of the parties reside out of the commonwealth, upon the confirmation of the return of the inquest; which would be in opposition to the intention of the acts, which were designed to afford a speedy remedy to the demandant, in causing partition to be made among the owners, whether they resided within the state, or in a foreign country. Nor is it perceived that any injustice will flow from this construction, as the presumption is, that the property has been appraised at its full value; and the rights of owners can be as well, if not better secured, than they would be when the property was sold in the absence of the parties in interest, at public auction. The publication which is directed in the supplements to the act concerning writs of partition, is the only notice which the legislature deemed necessary, where one or more of the owners resided out of the commonwealth, and is made as good and effectual as a personal service; on such service the parties are in court, and are deemed to have notice, not only of the writ of partition, but of all ulterior proceedings which may be necessary, until the final consummation of the cause. Whether the other parties are willing to take the property at the valuation, or not, is immaterial; as the courts are expressly em-

powered, in all events, to determine to whom the lands and tenements shall be conveyed.

The other errors depend on questions of fact, properly determinable by the court below, and are not the subjects of error in this court.

Judgment affirmed.

AMENDMENT OF RETURNS TO WRITS.—This subject is discussed at length in the note to *Malone v. Samuel*, 13 Am. Dec. 173. See also *Crocker v. Mann*, 26 Id. 684, and note referring to other cases in this series on the same subject.

RETURN NOT SIGNED.—A return by a deputy sheriff not signed in the sheriff's name is void: *Ditch v. Edwards*, 26 Am. Dec. 414 and note. In *Emley v. Drum*, 36 Pa. St. 125, it was held that a return signed in the sheriff's name "by H. S., deputy," constituted a sufficient signing by the sheriff; and *Dewar v. Spence* was cited as an authority with respect to the necessity and sufficiency of the signing of a return. It is cited on the same point in *Rudy v. Commonwealth*, 35 Pa. St. 168, in the opinion of the court below. The case is approved and followed also in *Commonwealth v. Chauncey*, 2 Ash. 99, as settling the doctrine in Pennsylvania that the omission of a sheriff to sign his return does not render it *ipso facto* void, although the court may quash the incomplete return and direct the sheriff to complete it by indorsing on the writ his execution thereof, and signing the same.

REESIDE v. KNOX.

[2 WHARTON, 283.]

ORDER IS NOT NEGOTIABLE WHICH IS DRAWN ON THE POSTMASTER-GENERAL of the United States by a contractor, payable to order, to be charged to the drawer's account for transporting the mails, and the holder can not sue the drawer thereon in his own name.

ERROE to the district court for the city and county of Philadelphia, in an action on the case by the plaintiffs, as holders, against the defendant Reeside, as drawer of the following order:

"\$5,000.

WASHINGTON, 18th April, 1835.

"SIR: On the first day of January, 1836, pay to my order, five thousand dollars, for value received, and charge the same to my account for transporting the U. S. mail, and oblige your friend,

JAMES REESIDE.

"To Hon. WM. T. BARRY, Postmaster-general."

The instrument was accepted by the treasurer of the post-office department as follows: "Accepted, provided the drawer shall perform his contract." It was indorsed by the drawer and by one Horbach and other indorsers, and was protested January 4, 1836. The defendant filed an affidavit of defense on May 11, 1836, setting forth, that being a contractor for transporting the

mails, and believing himself entitled, in accordance with the practice of the post-office department in such cases, to draw against the amount due him on the said contract, he had drawn the order in question, which was accepted by the treasurer of the department provisionally, as above stated; that he indorsed it to Horbach, who was concerned with him in transporting the mails, and knew all the circumstances, including the conditional acceptance; that before the order became due, payments to the defendant had been suspended, on the pretense that he had not complied with his contract; that there was still a large amount, beyond the amount of the said order, due him from the department; that he informed Horbach of the refusal to pay the order before it was due, and also gave notice at the bank in which it was deposited; that the deponent did not know whether the plaintiffs were the only owners of the order or merely Horbach's agents, but had reason to believe the latter; and further, that the order was not a negotiable bill, and the postmaster-general had no authority to accept it. A rule was afterwards granted against the defendant to show cause why judgment should not be rendered against him for want of a sufficient affidavit of defense, which rule, after argument, was made absolute, and the damages assessed. To reverse this judgment, this writ of error was brought, the points relied on being, that there being an affidavit of defense filed, the plaintiffs were not entitled to a judgment by default, and that the court erred in adjudging the order a negotiable bill of exchange, etc.

C. J. Ingersoll, for the plaintiff in error.

Meredith, for the defendants in error.

By Court, GIBSON, C. J. The first and more important point is disposed of in the opinion of the court in *West v. Simmons*,¹ and I shall confine myself to the question, whether the affidavit disclosed an effective defense, or, to express it differently, whether the instrument filed as the cause of action, is a valid bill of exchange. If it be not, the defendant below is not liable.

It is certainly not an insuperable objection to a bill, in every case, that the government is a party to it. In *Dugan v. The United States*, 3 Wheat. 172, it was held that the government might recover as the holder; and the principle seems to have been considered in *The United States v. Barker's Administratrix*, 4 Wash. C. C. 468. Neither would an objection lie to the form of the bill in the present instance, were the drawee an individual;

for the direction to charge the drawer's account, is only an indication of the means of reimbursement. I lay that circumstance, and the conditional acceptance of the treasurer, out of the question, and consider the bill as if it were drawn and accepted absolutely. Now an indispensable element in the constitution of these instruments, is an absolute and entire freedom from contingency of payment depending on the happening of an event, or the solvency of a fund. But in contemplation of law, is not every bill on government drawn on a fund, whether it be so expressed or not? It is a matter of public notoriety, that government accepts for no more, and is bound for no more, whatever be the form of acceptance, than it has in its hands; and that it treats a bill drawn on it as no more than an assignment or order of transfer. In the present instance the condition expressed in the treasurer's acceptance, indicated no more than the law would have implied without it. The officer, being a public agent, would not have been liable on an absolute acceptance; and the government itself would not have been liable, for it gave him no authority to bind it. The public officers may, doubtless, draw or receive bills to facilitate the business of their departments; but they would transcend their power, did they attempt to pledge the responsibility of the government as a merchant or banker in the money market. Though it may doubtless draw bills for its convenience, it is not a dealer in exchange; nor does it incur collateral responsibilities for its creditors. Its acceptance is no more than a recognition of the instrument as a transfer of credit, or an assignment of the funds in its hands; and it mingles in the transactions of its creditors no further.

But the payee in a valid bill of exchange, has no concern with the question of funds. He takes an absolute order for payment: and if he sees proper to take a conditional acceptance of it, that is a subsequent matter of his own arrangement. An ordinary drawee accepts sometimes without funds, but the government never. Now in the composition of a bill of exchange, there must be a drawer, a drawee, and a payee, capable, on the face of the bill, of contracting personally; for these instruments are based on personal credit, and not on the credit of a fund. But either of these may be actually disabled by infancy or coverture, without impairing the existence of the bill as an instrument, or affecting the mutual recourse of the other parties; and the reason is, that it would injure the circulation of negotiable paper, were an inquiry into such facts necessary to be made by

one who takes it in the course of his business for what it purports to be. But in the case of the government, which never enters into transactions as an individual, the payee is bound to take notice of its course. The event on which payment is to depend, is one of public notoriety, which has frequently been held an extrinsic cause of certainty, sufficient to remove an intrinsic uncertainty from the face of the bill, and which must be equally operative to introduce one. Had the order been payable, in terms, at the drawer's fulfillment of his contract, no one would have asserted it to be a valid bill of exchange: and yet no one would have been misled, in respect to its legal effect, by the want of such terms. He who takes a bill on a public department, expects it to be paid no otherwise than out of the funds of the drawer. The public agent is never liable on his acceptance; and the government itself enters into no contract of suretyship. It is impossible, then, to say that the legal effect of a bill, without these terms, but coupled with the notoriety of the course of public transactions, is different from the legal effect of a bill which contains them. Though I have found no case like the present, it seems entirely clear that the order was not negotiable; and it might admit of a doubt, whether the defendant could be called on before the plaintiff had filed a cause of action. But an affidavit was actually made, and the judgment was certainly irregular.

Judgment reversed.

NEGOTIABLE INSTRUMENTS, WHAT ARE.—This subject is considered in the note to *Woolley v. Sergeant*, 14 Am. Dec. 421. See also *Franklin v. March*, 25 Id. 462.

BILL DRAWN BY PUBLIC OFFICER.—Ordinarily a government officer is not liable on a contract signed by him with the addition of his official title, but if the contract is negotiable in form, the drawers and indorsers are personally responsible, as in the case of other negotiable instruments: *Bank of Kentucky v. Sanders*, 13 Am. Dec. 149, and see the cases cited in the note to that decision. To the point that a bill drawn on the government is not negotiable, the principal case is cited in *Horbach v. Reeside*, 6 Whart. 51, which was an action of *indebitatus assumpsit*, growing out of the same transaction, brought by Horbach, the last indorser of the order, who having been compelled to pay the money on it, it was held that he could recover the same from Reeside as money paid to his use.

AFFIDAVIT OF DEFENSE, INSUFFICIENCY OF.—In *Rising v. Patterson*, 5 Whart. 318, the principal case is referred to, among others, as establishing the position that where the facts set forth in an affidavit of defense are insufficient to prevent a recovery by the plaintiff, the court may give judgment as for want of an affidavit of defense.

OKIE v. SPENCER.

[2 WHARTON, 253.]

INDORSER OF AN ACCOMMODATION NOTE IS RELEASED BY GIVING TIME to the maker by a binding agreement of the promisee without the indorser's knowledge.

HOLDER'S ACCEPTANCE OF A CHECK OF THE MAKER AND A THIRD PERSON made payable six days after the note is due, by means of being post-dated, with the understanding that it is to be in full satisfaction if paid at maturity, discharges the accommodation indorser, if done without his knowledge.

PLEA SETTING FORTH THE FACTS SPECIALLY IN SUCH A CASE is sufficient on demurrer, since the court will infer, as a conclusion of law, from the facts, that there was an agreement, upon sufficient consideration, for an extension of time, and it need not be pleaded as an agreement to extend the time.

ERROR to the district court of the city and county of Philadelphia in assumpsit on a promissory note made by one Oliver Spencer, payable to and indorsed by the defendant. Among other special pleas, the defendant pleaded, in substance, that he indorsed said note without consideration, and for the accommodation of the maker; that at its maturity it was in the hands of one Williamson as holder, and that on that day it was agreed between the holder and maker that the former should accept the draft or check of the maker and one Marshall, as partners, upon a certain bank, for the amount of the note, payable six days after the maturity of the note, said check, for that purpose, to be postdated six days, and to be in full satisfaction of the note if paid at maturity; that said check was drawn and accepted accordingly, the said agreement, drawing, and acceptance being without the defendant's knowledge or consent, and that the plaintiff, as holder, had afterwards obtained judgment on said check against the drawers thereof. On general demurrer to this plea, the court gave judgment for the defendant, and the plaintiff brought this writ of error to reverse the same. The grounds relied on sufficiently appear from the opinion.

Brashears, for the plaintiff in error.

Law and Hubbell, for the defendant in error.

By Court, KENNEDY, J. The defendant here having indorsed the note in question, for the accommodation of the drawer, and therefore being regarded as a surety merely, it is admitted that if further time was given when it fell due, by the holder to the

drawer for the payment thereof, the defendant is thereby discharged. And the only question to be decided is, whether from the facts set forth by the defendant in his special plea, to which the plaintiff has demurred, the law will imply an agreement made on the third of May, the day the note became payable, by the holder of it, to give further time until the sixth of the same month, to the drawer for the payment thereof.

Had the defendant pleaded the general issue only, and under it, as he certainly might, given evidence of the facts set forth in his special plea, and the truth of them had been clearly established by the evidence or the admission of the plaintiff, without more having been shown to the jury, it would undoubtedly have been the duty of the court, to have instructed the jury, that the facts thus established, implied an agreement on the part of the holder of the note, for an adequate consideration received by him, to give time to the drawer for the payment of it, without having the consent of the defendant; and that the latter was thereby discharged from his liability as indorser. In the absence of all proof to the contrary, it can not be supposed here, that the drawer, when the note had become payable, could have had any other motive for giving the check of himself and his partner, securing the payment of it at the expiration of six days, than that of procuring indulgence for that space of time upon his note from the holder of it. That such, too, must have been the understanding of them both at the time, seems to be the necessary inference from the facts stated, if our judgments are to be guided in this respect by what we know to be the common and ordinary motives which generally influence and produce such arrangements. Marshall, the partner of the drawer of the note, does not appear to have been bound for the payment of it in any way before it fell due, which tends generally to strengthen, and in truth to make the inference that the check was given to procure further time for the payment of the note irresistible. And although the check can not be considered as having been taken in satisfaction of the note; nor as having extinguished it; yet the right of the holder to proceed against the drawer to enforce the payment of it, by suit, was thereby suspended until after the expiration of the six days. It was in effect changing, without the consent of the defendant, the terms upon which he had agreed as indorser to become liable for the payment of the note, and depriving him of the right to pay the note at maturity, if the drawer failed to do so, and then to sue him immediately for it, and therefore

amounted to a release of him from his liability. He had guaranteed by his indorsement, the payment of the note on the third of May, 1833; and it was not competent for the holder and the drawer without his concurrence, to extend his guaranty to the ninth of that month, which would clearly have been the effect of their agreement and the giving of the check, if the defendant were still to be held liable for the payment of the note.

That the holder, by accepting the check, put it out of his power to proceed on the note, by suit against the drawer, until after the six days, can not, as it appears to me, be controverted upon any ground that would seem to be consistent with the nature of the transaction, and what must have been the intent of the parties. Had the drawer given his own check merely, for the payment of the note at the expiration of the six days, there might have been some color for saying that he had not thereby precluded himself from bringing suit on it during that period; because it might then have been argued with great plausibility, if not correctly, that he had obtained by it no additional security, and consequently no adequate consideration to make a promise of indulgence binding: that by the check he acquired nothing except the personal responsibility of the drawer, which he had before by virtue of the note; and therefore, had he even made an express promise of indulgence for the six days, it might have been alleged, that he would not have been bound by it for want of a sufficient consideration; but as the case is presented by the special plea and demurrer, no such argument can be advanced or pretended: for by the check, the holder of the note received the additional responsibility of Marshall, as a security for the payment of it: and it would therefore seem almost impossible to imagine any other reason for giving such additional security, than that of procuring an extension of payment for the six days. It is true, that it may seem to have been but a short indulgence; but being a suspension of the right of the holder of the note, to sue the drawer upon it during that period, it operated as effectually to discharge the defendant from his liability, as if it had been six years; for in either case, to hold the defendant to be still bound by his indorsement, would be making him liable upon terms, and in short, for the fulfillment of a contract, different from what he had agreed to. The time of payment mentioned in a note, is always a very material part of it; and if it may be enlarged without the consent of the indorser, and he notwithstanding, be

held liable upon his indorsement, there is no reason why the amount may not also be enlarged: but it is obvious, that nothing of the kind can be done, without operating great injustice towards him; and therefore it is, if it be done, it shall release him from his liability. Every man, as long as he is a free agent, must be permitted to declare the terms upon which he is willing to incur an obligation; and having done so, it can not be altered in any material point whatever, without his consent; nor yet anything be done which may affect his rights in relation thereto.

The counsel for the plaintiff has cited in opposition to this, the case of *Pring v. Clarkson*, 1 Barn. & Cress. 14; S. C., 8 Eng. Com. L. 7, where a bill of exchange having been dishonored, the acceptor transmitted a new bill for a larger amount to the payee, without having had any communication with him respecting the first: the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards for a valuable consideration, indorsed it to the plaintiff. It was held that the second bill was merely a collateral security, and that the receipt of it by the payee, did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. Mr. Chief Justice Abbott, in pronouncing the opinion of the court, says, "In no case has it been said, that taking a collateral security from the acceptor, shall have that effect;" that is, of discharging the other parties to the bill; and concludes by saying, "here the second bill was nothing more than a collateral security." Now it is not easy to perceive why a collateral security should not have such an effect; for surely there is nothing in the nature of it, which renders the giving or the taking of it inconsistent with the holder's agreeing to give time to the acceptor of a bill, or the drawer of a note. On the contrary, such indulgence may be, and doubtless is in most cases, the very consideration upon which the collateral security is given and obtained; and as I have endeavored to show, makes the case, in the absence of proof of an express agreement to give time, still stronger in favor of an implied agreement to that effect, than where there is nothing more given than a bare renewal of the promise by the acceptor of the original bill, or the drawer of the former note, to pay the amount at a future date. But Chief Justice Abbott was mistaken, when he said, "in no case had it been said, that taking a collateral security from the acceptor shall have that effect;" for in *Gould v. Robson*, 8 East, 576, decided some fifteen years before,

it was not only said, but the case itself turned upon the very point. There the holder of the bill of exchange, when it fell due, after taking part payment of the acceptor, agreed to take a new acceptance from him for the remainder, payable at a future day, but in the mean time, the holder to keep the original bill in his hands as security; and it was held that it amounted to a giving of time, and a new credit to the acceptor, and therefore discharged the indorser. Besides, the authority of *Pring v. Clarkson* has been doubted by the profession. Mr. Chitty, in his *Treatise on Bills*, 442, 8th Eng. ed., after repeating the principle laid down in it, adds: "but it is submitted that the mere receiving further security, payable at a future day, would in general imply an engagement to wait till it becomes due." See also Bayley on Bills (5th ed.) 345, note 31; and Chitty, jun., on Bills (ed. of 1834), 100 w. a., note 1; and in *Kendrick v. Lomax*, 2 Crompt. & J. 405, it would seem to be overruled; for it was decided there, that the holder, by taking a renewed bill, impliedly agrees to give time until it becomes due, and can not sue in the interim on the original bill.

But it has been further objected by the plaintiff's counsel, supposing it to be held that an agreement by the holder to give time to the drawer of the note, may be fairly implied from the facts set forth in the special plea, that still the court can not make the implication, because this is making the facts therein stated, but evidence of such agreement, and therefore they ought either to have been referred to the jury under the general issue; or otherwise, the defendant, instead of setting out the facts merely in his plea, which, at most, are only evidence of the agreement to give time, ought to have set out the agreement itself, *quasi* an agreement, which is the gist of the defense. This objection, perhaps, would not be without weight, if the rules of special pleading were to be strictly regarded here; and might possibly be sustained by the force of authority. And as we are not much in the habit of special pleading, it would certainly, therefore, be well to avoid attempting to plead such matters specially, whenever, according to our practice, it may be dispensed with; but more especially in such an action as the present, wherein it is rarely, if ever done, in England; not even when special pleading was required, generally, in all cases, and attended to with the utmost strictness. To sustain this objection, it has been argued that the rule, which requires things to be pleaded according to their legal effect, applies here; and as the defendant claims that the facts set forth in his plea, amount

to an agreement in law to give further time for payment, he ought, therefore, to have stated the agreement simply; because this is the aspect in which he wishes the matter to be considered by the court, and, therefore, he ought to have so presented it, and not in the indirect and circuitous mode of allegation which he has adopted. Under this view of the rule, it was laid down in *Stroud v. Lady Gerrard*, 1 Salk. 8, which was debt on a bail-bond, that if the defendant has put in special bail, he can not plead in terms, that he has put in such bail, but must plead *comperuit ad diem*; because, as is there said, he must plead according to the operation things have in law. This rule, however, as I apprehend, has not been regarded in this, and some of the other states, with the same strictness as in England.

In *Herrick v. Bennett*, 8 Johns. 374, it was held, upon demurrer to the plaintiff's declaration on a promissory note, to be sufficient that it was set out according to its terms. The note, as stated in the declaration, was without any time being mentioned therein for payment, and the court say: "It is to be presumed that the plaintiff has stated the note in his declaration, according to the terms of it, and that is sufficient. The conclusion of law is, that when no time is specified in a note, it is payable immediately." It appeared the note was not declared on according to its legal effect; but the court having the terms of the note, or, in other words, the facts therein contained, presented by the plaintiff's declaration, and admitted by the defendant's demurrer to be true, conceived the only matter then in issue between the parties was thus reduced to a mere question of law, which they, according to the maxim, *ad questionem legis non respondent juratores sed judices*, were bound to answer, and accordingly rendered a judgment in favor of the plaintiff.

This decision of the supreme court of New York was followed by this court in a case decided by it at Pittsburgh, some eight or ten years ago, which I believe has not been reported. It was preferred to the decision given in the case of *Bacon v. Page*, 1 Conn. 404, which was cited and shown on the argument; wherein the same point arose, and received a directly contrary decision, by the supreme court of Connecticut. This latter court say that the plaintiff should declare on a contract, according to its legal effect, and not on the evidence of the contract: that it did not appear from the declaration that the note had become payable; and accordingly reversed the judgment which

had been rendered against the defendant below, by the default.

In the case before us, from the facts set forth in the special plea, the conclusion of law, that the holder of the note, when it fell due, for an adequate consideration, agreed to give time to the drawer to pay it, is quite as strong and as certain, as that the law, when a note is given for the payment of money, without any time being specified therein for that purpose, makes it payable, by implication, immediately. The plaintiff was bound to know the conclusion which the law would draw from the facts stated in the plea, if true; and if not true, he knew them not to be so, and therefore ought, and no doubt would, have taken issue upon them, and put the defendant on proving them before a jury. Seeing, however, that he has only denied their sufficiency in law to defeat his claim against the defendant, we must take it that they are true, as stated in the plea. No question of fact, therefore, remains to require the intervention of a jury; the matter in issue is reduced to a mere question of law, which the court is bound to decide. Considering, then, the facts as being sufficient to raise, by implication of law, a binding promise on the part of the holder of the note, at the time it became due, to give the drawer further time for the payment of it, which discharged the defendant from his liability as indorser, we affirm the judgment.

Judgment affirmed.

RELEASE OF SURETY OR INDORSER BY INDULGENCE TO PRINCIPAL: See *Bank of Montpelier v. Dizon*, 24 Am. Dec. 640; and *Brown v. McDonald*, 29 Id. 112, and the notes thereto, referring to other cases in the American Decisions on the same subject. Giving time to the indorser of a note made for his accommodation, after the maturity thereof, where he has given a bond of indemnity to the maker, will not discharge the latter, although the holder knows, when he grants the indulgence, that the maker is an accommodation maker: *Bank of Montgomery v. Walker*, 11 Id. 709 and note. So generally the maker of a note drawn and negotiated for the indorser's accommodation, is not discharged by giving time to the indorser, though the facts are known to the holder: *Clopper v. Union Bank of Maryland*, 16 Id. 294. The principal case is cited in *Sawyers v. Hicks*, 6 Watts, 78, to the point that where the promisee in a contract makes a binding agreement, suspending his remedy against the principal promisor, the surety is thereby discharged. And it was decided in *Myers v. Wells*, 5 Hill, 463, referring to *Okie v. Spencer*, among other cases, as authority, that an accommodation indorser was released by taking the maker's notes after the maturity of the original note for the payment of the debt at a future day, on the ground that the promisee's right to sue the maker was thereby suspended until the new notes became due. The principal case is, however, not an authority for so broad a doctrine; for there it was not merely the debtor's own note which was taken, but there

was further security furnished, by adding the liability of another person, and this was a circumstance which, as will be seen from the opinion, materially contributed to the decision that the remedy was suspended. It is certain at least that the subsequent Pennsylvania cases hold that an agreement to suspend the remedy on a debt is not to be implied merely from the taking of the debtor's own note payable at a future day.

In *Shaw v. First Associated Reformed Presbyterian Church*, 39 Pa. St. 234, Mr. Justice Strong reviews the cases, including *Okie v. Spencer* and the above-mentioned New York decision of *Myers v. Wells*, 5 Hill, 463, and repudiates the doctrine of the latter case. After commenting upon these and other cases, he concludes as follows: "But the later Pennsylvania decisions take different ground, and follow the ruling in *Pring v. Clarkson*, 1 Barn. & Cresm. 14, in which it was decided, that the acceptance of a new bill from the acceptor of a former bill after it had become payable, for the payment of the same debt at a future day, could only be considered taking a collateral security, and therefore did not amount to or imply giving time to the acceptor, and consequently did not release the other parties to the bill first given. In *Weakly v. Bell*, 9 Watts, 273, Judge Kennedy, who also delivered the opinion in *Okie v. Spencer*, goes over the cases, and comes to the conclusion that 'taking a new note for the same debt mentioned in the old, without any agreement to give time to the drawer, or to deliver up the old note to him, or that the new shall be taken in satisfaction of the old note, has ever been considered a mere collateral security, which does not affect or alter the original liabilities of the parties on the note in any respect whatever.' And in *Bank of Pennsylvania v. Potius*, 10 Watts, 150, the doctrine asserted in *Weakly v. Bell* was reaffirmed. *Ripley v. Greenleaf*, 2 Vt. 159; *United States v. Hodge*, 6 How. (U. S.) 279, and *Wade v. Stanton*, 5 Id. 371, as well as *Elwood v. Dieffendorff*, 5 Barb. 298, are substantially to the same effect. All of these cases I understand as holding that there is no implication that the creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note, payable at a future day, on account of it. They maintain that the law raises no such agreement, and if there be one, it is to be proved as a fact, dependent for its existence on the understanding of the parties at the time when the security is given." It was there held, in accordance with these views, that a new note taken by the creditor from his debtor, payable beyond the date of the maturity of the original indebtedness, did not of itself imply an agreement to extend the time, but such an agreement, if relied upon to prevent proceedings on the original indebtedness within the time, must be proved *aliunde*. As to the effect of taking a note payable at a future day for an antecedent debt, in suspending the remedy on the debt until the note matures, see also *Glenn v. Smith*, 20 Am. Dec. 452.

STREEPER v. ECKART.

[2 WHARTON, 302.]

TRANSFER OF CHATTELS, UNACCOMPANIED BY A CHANGE OF POSSESSION, is void as against creditors.

TRANSFER OF CHATTELS BY A DEBTOR A FEW DAYS AFTER A JUDGMENT has been recovered against him, even though it be for value, and accompanied by a change of possession, affords suspicion of an intent to defeat the judgment creditor's claim, and the transferee is bound to remove all doubts of the fairness of the transaction in a contest with such creditor.

ERROR to the district court for the city and county of Philadelphia, in an action of trespass *vi et armis, de bonis asportatis*, etc., to recover damages for the taking of certain horses and carts. The plaintiff claimed under a bill of sale of the property, made August 30, 1832, by one Jefferies, who was then owner, expressed to be for a valuable consideration, and gave evidence tending to show that the consideration was a certain debt due the plaintiff from the said Jefferies, and that on August 31, 1832, the plaintiff, by a written agreement, produced on the trial, hired the property to Jefferies, to be used by him, the plaintiff to receive one half the earnings. It appeared that Eckart, one of the defendants, recovered a certain judgment against Jefferies on August 17, 1832, upon which execution was issued, and levied on the property in question on September 11, 1832, by the other defendant, as constable, said property being then in Jefferies' possession. The plaintiff gave the constable notice that the property was his on September 25, and demanded possession, but the constable went on and sold the same under the execution. The judgment and execution were produced on the trial. The judge of the court below instructed the jury that the transfer after the recovery of a judgment against the former owner of the chattels, gave the transaction a "deep complexion of fraud," and necessitated a "jealous examination" of the conduct of the parties to it; that even if there was a full consideration, if the property remained in the debtor's possession, the sale was void as against creditors, and that "a party claiming against the creditors, would be bound to remove all doubt of the fairness of the transaction, even if the possession accompanied the transfer." He left it to the jury to determine whether there was any consideration for the transfer. He further instructed them that, although a judgment debtor might undoubtedly make a *bona fide* sale of chattels, notwithstanding the judgment against him, and although the purchaser might lawfully hire them out to another person, yet there must be nothing colorable about it. There must be an absolute, exclusive, and substantial change of possession, and the possession must be continuing in its character to render the transfer valid. "The taking possession," said he, "of horses and carts for a single night, followed by a restoration of them in the morning, on an alleged contract of hiring, when the design that they should be restored existed at the time of the taking possession, would be a device in fraud of the law, and would not be permitted to prevail.

* * * Any mere temporary possession, taken with a view of evading the rule of law relative to unequivocal possession, but which is followed by placing the property visibly in the face of the world, just where they were before the alleged transfer, would be fraudulent." The remainder of the charge being of the same general tenor, it is unnecessary to repeat it further. The plaintiff excepted to the charge, and after verdict and judgment for the defendants, brought this writ of error. The objections relied on to reverse the judgment are sufficiently apparent from the opinion. Submitted without argument.

Arundel and Meredith, for the plaintiff in error.

Jack and Cohen, for the defendants in error.

By Court, KENNEDY, J. Several errors have been assigned, consisting of exceptions to the charge delivered by the district court to the jury; but it is considered unnecessary to notice them in detail, as we are of opinion that the charge is perfectly unexceptionable throughout. It is not only in accordance with the principles laid down and resolved in *Twyne's case*, 3 Co. 80, which may be considered the leading one in relation to covinous transfers of property, made by debtors, to hinder, delay, or defraud their creditors, but is supported by a train of decisions made by this court, which, it appears to me, ought to leave no doubt upon the mind of any one, as to what the law is in this state, on this subject: See *Will v. Franklin*, 1 Binn. 521 [2 Am. Dec. 474]; *Dawes v. Cope*, 4 Id. 258; *Wager v. Miller*, 4 Serg. & R. 123; *Clow v. Woods*, 5 Id. 278 [9 Am. Dec. 346]; *Cunningham v. Neville*, 10 Id. 201; *Babb v. Clemson*, Id. 419 [13 Am. Dec. 684]; *Martin v. Mathiot*, 14 Id. 214. If there be any principle established by these cases, it is that a transfer of personal property, unaccompanied by a corresponding transmutation of the possession, is void as against creditors. This is a general rule, clearly settled by them, which can not be dispensed with, where it is practicable to make the change. The reason of the rule is, that the possession of personal property is *prima facie* evidence of ownership; and the person, therefore, who has once become the owner of such property, and obtained the possession of it, may well be considered by every one the real owner, as long as he shall remain in the actual possession, and continue to exercise daily acts of ownership over it. He thereby necessarily acquires a credit on account of it, which, from the very nature of things, must continue to be the case while he retains the possession, and con-

tinues to use it. Under such appearances of ownership, every man is justified in regarding him as still being the owner; and in giving him credit, or having become his creditor, in extending indulgence to him on account of it. This being the case, it is obvious that the purchaser of property, who leaves the seller in the possession and use of it afterwards, as before, thereby gives the latter a deceptive credit in the world, which would operate very unjustly, if he were permitted, under such circumstances, to withdraw the property from the creditors of the seller, when it becomes the only means of paying their claims, and may fairly be supposed to have influenced them in giving the seller credit, or otherwise indulgence, or possibly both.

To prevent every one, therefore, from being deceived by the appearance of ownership, when it has ceased after having once existed, the party to whom the right of ownership has been transferred, if he wishes to make himself secure against the creditors of his vendor, must take the property into his exclusive possession, so that the change of possession, which is an index of the transfer of the right of property, may be visible, and by this means become known to all whom it may concern. Seeing then this is the object of the law, in requiring that a change of the possession shall accompany a transfer of the right of property, how is it possible that a change, merely for a single night or day, can answer the purpose, and advertise the public of the change of ownership in the property? It is perfectly manifest, that it can have no such effect, and therefore can not be regarded as meeting the requisition of the law in this respect. A sale made, however, by a sheriff, of property taken in execution, forms an exception to the general rule on this subject; or not being a sale by the act of the owner himself, but by operation of law, it may, perhaps, more properly be said not to come within the rule. It is made under the authority of judicial process by a sworn officer of the law, and upon public notice thereof previously given; so that it is presumed to be fair, and free from fraud, until the contrary is made to appear; and if fair, every one is bound to take notice of it. The vendee, therefore, of the sheriff, in such case, may bail the goods or property to the defendant named in the execution, as a loan, or otherwise, as he pleases, without rendering it liable to be taken in execution again for the debts of the same defendant: See *Myers v. Harvey*, 2 Penn. 481 [23 Am. Dec. 60].

But suppose that Streeper, in this case, upon the property's being transferred to him by Jefferies, for a full consideration

paid, had taken it into his own exclusive possession, and kept it; the circumstance of its having been done but a few days after Eckart, one of the defendants here, had obtained a judgment against Jefferies; and when it was no doubt expected that an execution would be sued out thereon shortly, was certainly calculated to awake suspicion, if not strongly indicative of the transfer having been made collusively, and with a fraudulent intent, and therefore not *bona fide*. In *Twyne's case*, it was resolved to be a mark of fraud, and is so laid down by this court in *Babb v. Clemson*, 10 Serg. & R. 424 [10 Am. Dec. 684]; as also in other cases. And according to the statute of 13 Eliz. the transfer must not only be made on a valuable consideration, but likewise *bona fide*; and hence, if the sale and transfer of the property were made between the parties, with intent to defeat Eckart in obtaining execution of his judgment, it was *mala fide*, and void as against him.

That this case, judging from the evidence, was beset with pretty strong indications of fraud in fact is very apparent; and it would, therefore, have been the very height of error in his honor, the judge of the district court, to have charged the jury as the plaintiff's counsel required, to wit, "that from the evidence, there was a full consideration paid for the horses and carts, and possession taken of them under a *bona fide* sale; and that the plaintiff was entitled to a verdict." But there was certainly great propriety, as well as strong reason for his instructing the jury as he did, that "a party claiming against the creditors, would be bound to remove all doubt of the fairness of the transaction, even if possession had accompanied the transfer."

Being perfectly satisfied with the instruction of the court to the jury, we therefore affirm the judgment.

Judgment affirmed.

RETENTION OF POSSESSION BY A VENDOR OR MORTGAGOR of chattels, effect of, as evidence of fraud: See *Clayborn v. Hill*, 1 Am. Dec. 452; *Sturtevant v. Ballard*, 6 Id. 281, and note; *Crooks v. Powers*, 8 Id. 99, and note; *Closs v. Woods*, 9 Id. 346, and note; *Patten v. Smith*, 10 Id. 166; *Mason v. Baker*, Id. 724; *Babb v. Clemson*, 13 Id. 684; *Coburn v. Pickering*, 14 Id. 375, and note; *Rocheblave v. Potter*, Id. 305, and note; *Bissell v. Hopkins*, 15 Id. 259, and note; *Fletcher v. Howard*, 16 Id. 686; *Holbrook v. Baker*, 17 Id. 236; *Glasscock v. Batten*, 18 Id. 703; *Batchelder v. Carter*, 19 Id. 707; *Diener v. McLaughlin*, 20 Id. 655; *Swift v. Thompson*, 21 Id. 718, and note; *Lewis v. Whittemore*, 22 Id. 466; *Staples v. Bradbury*, 23 Id. 494; *Callen v. Thompson*, 24 Id. 587; *Moore v. Kelley*, 26 Id. 283. To the point that to make a transfer of personal property available against creditors and subsequent purchasers, it must be accompanied by a change of possession at the time or

within a reasonable time thereafter, the foregoing case of *Streeper v. Eckart* is cited in *McBride v. McClelland*, 6 Watts & S. 95; *Jordan v. Brackenridge*, 3 Pa. St. 443; *Hugus v. Robinson*, 24 Id. 12. So that where the delivery is not open, visible, and notorious, but is, on its face, merely feigned or symbolical, and no explanation is given of its suspicious appearance, it is the duty of the court to pronounce the transfer void: *Cadbury v. Nolen*, 5 Id. 326; *Hugus v. Robinson*, 24 Id. 12; *Chase v. Ralston*, 30 Id. 541.

BLACK AND WHITE SMITHS' SOC. v. VANDYKE.

[2 WHARTON, 309.]

EXPULLED MEMBER OF AN INCORPORATED BENEFICIAL SOCIETY can not have the regularity of the proceedings or the sufficiency of the evidence for his expulsion inquired into in a collateral action for the recovery of benefits alleged to be due him, such expulsion having been voted after notice, trial, and conviction, agreeably to the provisions of the charter and by-laws, upon a charge thereby made a ground of expulsion.

IRREGULARLY EXPULLED MEMBER MAY HAVE MANDAMUS to restore him to membership in such a society, it seems.

NO ACTION LIES TO RECOVER BENEFITS alleged to be due a member of such an organization, even though there has been no sentence of expulsion.

ERROR to the common pleas for the city and county of Philadelphia in an action brought by the plaintiff to recover certain weekly benefits alleged to be due him as a member of the Black and White Smiths' society. It appeared that the plaintiff had been expelled from the society. Part of the benefits sued for were claimed as having accrued before his expulsion, and the remainder since that time, the plaintiff claiming that the expulsion was illegal. The provisions of the charter and by-laws material to the case, and the facts relating to the expulsion, are sufficiently stated in the opinion. The verdict and judgment below were for the plaintiff, and the defendants brought this writ of error. The grounds relied on to reverse the judgment were in substance, that the court erred in admitting evidence to disprove the truth of the charges upon which the plaintiff was expelled, and the facts stated in the examining physician's certificate, and in charging the jury that if the charge upon which the plaintiff was expelled was proved untrue, he could recover in this action, and could treat the expulsion as a nullity, etc.

Dallas, for the plaintiffs in error.

Kennedy, for the defendant in error.

By Court, GIBSON, C. J. It is said that by-laws preclusive of

recourse to remedies beyond the corporate jurisdiction, are void, because the general legislative power only is adequate to take from the citizen his remedy by due course of law. But a corporator may undoubtedly surrender, by consent, a matter of common right, which he could not be deprived of by a by-law that had not received his assent: *Asley v. The Whitstable Company*,¹ 17 Ves. 323. Independently of implied assent, the by-laws of a municipal corporation, within the scope of its corporate powers, bind, by statutory or prescriptive force, all who happen to be within the territorial limits of its jurisdiction, whether corporators or strangers. But the by-laws of a private corporation like the present, derive their force from assent, either actual or constructive. How far then did the plaintiff below assent to the jurisdiction of the tribunal, by which he was disfranchised?

There are points of limitation to the general presumption of assent to things, done at a regular meeting; for that the presumption has no place where the act was otherwise illegal, is collectible from *Slee v. Bloom*, 19 Johns. 456 [10 Am. Dec. 273]. The matter here, however, depends not merely on presumption of assent to a by-law, but on the charter to which the plaintiff expressly assented at his initiation; and he is consequently bound by everything done in accordance with it. The seventh article declares that the stewards, doubting the inability of a beneficiary to pursue his business, may have him examined by a physician, whose report is to be conclusive; and the twentieth declares, that being served with a copy of the charge, and summoned to appear at the next stated meeting, he shall, on trial and conviction by two thirds, be dealt with agreeably to the by-laws. These ordain, that no member receive benefits for a disease induced by debauchery, drunkenness, or offensive fighting; but that a culprit in any of these predicaments, being reported by the stewards to the next stated meeting, be expelled. The plaintiff was thus reported, and charged by the stewards with inducement of disease by intoxication; and at the next stated meeting, the hearing of the charge and the answer submitted, was adjourned. At the third meeting, though resummoned, he failed to appear, but sent a written request for a further postponement; whereupon he was convicted and expelled by the requisite majority. Into the regularity of these proceedings, it is not permitted us to look. The sentence of the society, acting in a judicial capacity and with

1. *Adley v. The Whitstable Company*.

undoubted jurisdiction of the subject-matter, is not to be questioned collaterally, while it remains unreversed by superior authority. If the plaintiff has been expelled irregularly, he has a remedy by mandamus to restore him; but neither by mandamus nor action, can the merits of his expulsion be re-examined. He stands convicted by the sentence of a tribunal of his own choice; which, like an award of arbitrators, concludes him. Even were there not a sentence in the way, payment of his stipendiary allowance could not be enforced by action. The society never consented to expose itself to the costs and vexation of an action for every weekly pittance that might be in arrear. For open disregard of the prescribed forms of procedure, the remedy would be by mandamus to the proper organ; but that results from the visitorial power incident to the king's bench, which is reserved to this court by the act of 1722, and which enables it to supervise and correct the abuses of inferior jurisdictions. The remedy by action was therefore misconceived.

Judgment reversed.

MANDAMUS LIES TO RESTORE A STOCKHOLDER to his rights in a corporation where his name has been stricken off without notice and without an opportunity to defend himself: *Delacy v. Neuse River Navigation Co.*, 9 Am. Dec. 636.

EXPULSION FROM INCORPORATED SOCIETY, WHEN.—It is held in *Commonwealth v. Pike Beneficial Society*, 8 Watts & S. 247, and in *Society for the Visitation of the Sick v. Meyer*, 52 Pa. St. 131, both approving and following *Black and White Smiths' Society v. Vandyke*, that where the charter of an incorporated association provides for the expulsion of members for certain offenses, a member who has been regularly tried and expelled for such an offense, can not have the merits of his expulsion inquired into in a court of justice, but the decision is conclusive against every collateral attack. The same doctrine was admitted in *Commonwealth v. Oliver*, 2 Pars. Sel. Cas. 426, but it was held not to apply where the expulsion was for an offense for which expulsion was not made a penalty by the charter or by-laws. That was a case where, by the discipline of a certain church, the minister was authorized to expel members for offenses against religion or the spiritual interests of the church, and for immoral and improper conduct, and he undertook to expel certain members and trustees of the church for refusing to convey certain property in accordance with his wishes, and the court held that the expulsion was a nullity, and did not deprive the persons so expelled, of their church membership, or debar them from continuing to act as trustees.

SHEWELL v. KEEN.

[2 WHARTON, 332.]

LEGACY IN THE EXECUTOR'S HANDS IS NOT SUBJECT TO FOREIGN ATTACHMENT for the legatee's debt.

ERROR to the district court for the city and county of Philadelphia. The plaintiff below issued a writ of foreign attachment against Standish Forde and John B. Forde, for the attachment, among other things, of property devised to the debtors by Sarah Forde, deceased, and to summon the executors of her will as garnishees. The executors, in their answers to interrogatories, admitted that the said Standish and John B. Forde were each entitled, under the will, to one sixth of the residue of the testator's estate after payment of debts, etc.; that all the debts which had come to their knowledge had been paid, and that a large balance had been reported by the auditors to the orphans' court for distribution, and now remained in their hands. A case was stated minutely setting out all the facts, and the only question submitted to the court was, whether the property in the defendants' hands, as executors, was attachable. The judgment below was in their favor, and the plaintiff brought this writ of error.

C. Ingersoll and Miles, for the plaintiff in error.

G. M. Wharton and F. W. Hubbell, for the defendants in error.

By Court, SERGEANT, J. In every case in which a determination has taken place on the question whether a foreign attachment would lie for a legacy, it has been held that it would not, and some of these cases have occurred under statutory regulations on the subject, very similar to our own. Various reasons have been given for coming to this result; and a little reflection convinces us that the proceedings by foreign attachment, can not be applied to the case of a legacy, without great inconvenience and manifest incongruity.

A pecuniary legacy is not a debt. It is a sum of money, payable by the executor or administrator out of the estate of the decedent, if sufficient assets remain in his hands, after discharging the debts of the deceased and other responsibilities, and provided the legatee previously complies with certain requisites, prescribed by the acts of assembly. Generally it is not recoverable at law, but is subjected to chancery jurisdiction, which treats the executor as trustee of the estate for the benefit

of those interested in it. In Pennsylvania, a legacy is recoverable in a common law court, by the act of 1772, there being no court of chancery; but that act gives peculiar powers to the court; and the executor's duty is still in nature of a trust, in relation to legacies; and they are payable only on the performance of certain conditions by the legatee. He must make a previous demand, and must tender or file a refunding bond, not so much for the protection of the executor, as for the benefit of creditors who may subsequently establish claims against the estate. If a foreign attachment be permitted, by which the assets in the hands of the executor are to be eventually appropriated to the attaching creditor, the legacy may be recoverable without demand, and without filing a refunding bond. For the legatee would not be expected to give such bond, and there exists no power in the court to compel the attaching creditor to do it, or to authorize the executor to receive it from him. If the refunding bond could be given, an extraordinary result might follow. The plaintiff, before the payment of the money by the garnishee, always gives security to restore the amount received, if within a year and a day, the defendant should appear to disprove the debt. If within the year and day, the defendant issue his *scire facias ad disprobandum debitum*, and succeeds, and recovers back his legacy, he then gets it without giving any refunding bond; and the plaintiff may be compelled, in the event of new debts against the estate being afterwards established, to pay the amount a second time on his refunding bond. Such consequences evince that the process by foreign attachment can not be harmonized with the acts of assembly concerning the recovery of legacies.

Another circumstance of weight is, that an executor or administrator is, to a certain extent, an officer of the law, clothed with a trust to be performed under prescribed regulations. It would tend to distract and embarrass these officers, if, in addition to the ordinary duties which the law imposes, of themselves often multiplied, arduous, and responsible, they were drawn into conflicts created by the interposition of creditors of legatees, and compelled to withhold payment of legacies, without suit; to suspend indefinitely the settlement of estates; to attend, perhaps, to numerous rival attachments; to answer interrogatories on oath, and to be put to trouble and expense for the benefit of third persons, no way connected with the estate, nor within the duties of their trust. It has been decided that money in the hands of a prothonotary or sheriff can not be in-

tercepted by a creditor of the party entitled to it; but it must be paid over to himself only: 1 Dall. 354.¹ The case of an executor or administrator is analogous to that of a sheriff or prothonotary. He has the fund in his hands as an officer or trustee authorized by law; and if a new party were allowed to levy on it by attachment, there would be no end of disputes and lawsuits; and no business could be certain of ever being brought to a close within a reasonable time. It is of great importance to the interests of heirs, creditors, and legatees, that the affairs of a decedent's estate be kept as simple and distinct as possible; that its concerns be speedily closed, and the estate adjusted. It is moreover settled, that an executor can not be sued as defendant, in an attachment by a creditor of the testator, and the goods of the testator attached to recover the debt: 2 Dall. 73. The reason is, that the estate of a testator ought to come into the hands of the executor, that he may administer it according to law; and pay the debts if the assets suffice; and they ought not to be stopped, and the executor subjected to new responsibilities, by proceedings in attachment. These reasons apply with equal force to the attempt to make an executor garnishee, for the purpose of paying out of the assets in his hands the debt due to a creditor of a legatee. These funds must travel only in the path pointed out by the laws relating to decedents' estates in their various branches; and can not be diverted out of that path, without interfering with salutary regulations, and violating some of the most important provisions of the acts of assembly.

Judgment affirmed.

PERSONAL LEGACY CAN NOT BE ATTACHED, but where it is charged upon realty devised to another, it is attachable in the devisee's hands for the legatee's debt: *Woodward's Ex'rs v. Woodward*, 17 Am. Dec. 462. The case of *Barnett v. Weaver*, 2 Whart. 418, was a similar one to *Shewell v. Keen*, and was decided in accordance with the doctrine laid down therein. The principal case is cited and followed on the same point as applied to an attachment issued prior to the act of July 27, 1842, making legacies attachable. It is referred to also in *Sinnickson v. Painter*, 32 Pa. St. 386, as showing how the law stood prior to the statute. So in *Gochenaux's Executors v. Hostetter*, 18 Id. 416, where it is said that the statute was enacted for the purpose of changing the law as held in *Shewell v. Keen*. The case is distinguished in *Pleasants v. Cowden*, 7 Watts & S. 380. In that case a debt due the estate of a testator was attached for a debt owing by the executor, who was also the residuary legatee. The attachment was quashed by the court below, and this was held error by the supreme court, and it was decided that the party should raise the question by plea, as to whether the debt belonged to the

1. *Ross v. Clarke*.

estate or to the executor. The court was of opinion that if the debt were coming to the defendant as residuary legatee, and might therefore be termed a legacy, it was not on that ground to be considered as not subject to the attachment; and Kennedy, J., said: "It does not come within the principles upon which it was held by this court in the case of *Shewell v. Keen*, 2 Whart. 332, that a legacy in the hands of an executor could not be attached for the debt of the legatee by process of foreign attachment. There the legatee was not entitled to receive the legacy without first giving the executor a refunding bond, with at least two sureties in it; a thing that the creditor of the legatee could not do, and without which the executor, as the law stood then, could not be compelled to pay the legacy to either the legatee or his creditor. In the present case, however, the defendant is the executor as well as the legatee, and if the law relating to legacies were the same now that it was then, which it is not, no refunding bond would be requisite, nor could it be given in conformity to the act of assembly which then existed on the subject, seeing the legatee and the executor are the same person, and that it would be impracticable for the legatee to give a bond to himself, as also altogether idle and nugatory." Attachments of legacies, distributive shares, etc., are now, as already remarked, provided for by express statute in Pennsylvania: See *Purd. Dig.* 435, sec. 35; 436, sec. 36; 492, sec. 6.

WACK v. SORBER.

[2 WHARTON, 387.]

PAROL GIFT OF LAND IS NOT SO FAR EXECUTED BY REASON OF IMPROVEMENTS as to take the case out of the statute of frauds, and prevent a rescission, where it appears that the donee has been in possession five years, but has made improvements not to exceed the value of one year's rent, and those not of permanent value.

ERROR to the common pleas of Lehigh county, in an action of ejectment brought by Sorber against Wack. The plaintiff claimed, through mesne conveyances, from Henry Romig, who conveyed to the plaintiff's grantor April 20, 1830. The defendant produced in evidence an agreement made in 1824, between Romig and his son, for a sale by the former to the latter of all his land except the premises in dispute, and providing that the son should assist his sister, Esther Wack, wife of the defendant, to build a house on the premises in controversy, to be paid for out of her money, in case the father should not himself build it. There was evidence also tending to show a parol gift of the land by Romig to his said daughter Esther, and that she and her husband, the defendant, lived on the same in a house erected by Romig for over five years prior to 1830; that the defendant had, during his residence on the land, made improvements, consisting of a garden, cow-stable, and repairs of fencing. Some of the witnesses testified that the cow-stable

was worth about twenty or thirty dollars, and that the house and land would rent for thirty dollars a year. The evidence of a gift was not very satisfactory. There was evidence to show that shortly after the conveyance by Romig to the plaintiff's grantor, the latter brought an action of ejectment against the defendant, which, after a report of arbitrators in favor of the defendant, was settled and the costs paid. The court below instructed the jury, in substance, that where a parol contract for the conveyance of land was so far executed that the parties could not be replaced *in statu quo*, it would be enforced notwithstanding the statute of frauds, as where a party entered under such a contract and made large improvements, but that the contract must be established, and the facts relied on as constituting part performance must be clearly proved, and that the same principles would apply to a parol gift of land by a parent to a child. The question as to whether there had been such a gift in this case was left to the jury, as also the question as to what had been done by the defendant in consequence of the gift, if there was a gift, with respect to improvements; and the jury were instructed that if the defendant's occupation of the land was a full compensation for his improvements, the case was not taken out of the statute. In conclusion the court said: "If you believe that no improvements have been made beyond twenty or thirty dollars, and that the property was worth thirty dollars a year, and that the defendant occupied the same for seven years, then in point of law the case would not be taken out of the operation of the statute, and the plaintiff would be entitled to your verdict." Verdict and judgment for the plaintiff, and the defendant sued out this writ of error, relying chiefly on alleged errors in the instructions.

Gibbon and Mallery, for the plaintiff in error.

Porter, for the defendant in error.

By COURT. The law of the case was fairly stated. There was scarce sufficient evidence of a contract to be left to the jury. But, permitting them to find a parol gift, if they should think proper, they were directed to inquire whether, as an inducement to expenditure, the gift had been, in fact, a prejudice to the donee. This put the cause on its true point. The improvements, as they are called, were at most equal in value only to a year's rent, and the donee had the premises five years. Beside the improvements were not such as added to the permanent value of the land, consisting, as they did, in repairs of fences,

and the erection of a shed for a cow-stable—expedients for present enjoyment, which can never be resorted to for an equity. These attempts to turn an experimental investiture of possession into a sale or gift executed, are of such repeated occurrence, as to require the courts to hold a strict hand over them. There was nothing here to justify the inference of a gift in the first instance, or to take it out of the statute of frauds, if there had been one.

Judgment affirmed.

CONTRACT FULLY EXECUTED is not within the statute of frauds: See the note to *McCampbell v. McCampbell*, 15 Am. Dec. 62. See also *Erskine v. Plummer*, 22 Id. 216; *Stone v. Dennison*, 23 Id. 654, and note.

PART PERFORMANCE TAKES A PAROL CONTRACT out of the statute of frauds, when: *Chapman v. Allen*, 1 Am. Dec. 24; *Simmons v. Hill*, Id. 398; *Wetmore v. White*, 2 Id. 323; *Ramsay v. Brailsford*, Id. 698; *Ricker v. Kelly*, 10 Id. 38; *Townsend v. Houston*, 27 Id. 732; and when not, *Givens v. Calder*, 2 Id. 686; *Meach v. Perry*, 6 Id. 719; *Jones v. Peterman*, 8 Id. 672; and see the note to *Townsend v. Houston*, 27 Id. 745. That in order to take a parol contract for the sale of lands out of the statute of frauds, there must be such part performance as can not be compensated in damages, is a principle which *Wack v. Sorber* is cited as recognizing, in *Moore v. Small*, 19 Pa. St. 467.

DEICHMAN'S APPEAL.

[2 WHEATON, 395.]

STATUTE DOES NOT IMPAIR OBLIGATION OF CONTRACT, WHEN.—A statute taking away the preference given to judgments, in the payment of debts owing by a deceased insolvent's estate, by a prior statute, applies to judgments recovered after the passage of the first statute, and before the passage of the second, where the debtor dies after the second statute is enacted, and is not unconstitutional as impairing the obligation of contracts.

APPEAL from a decree of the orphans' court of Lehigh county, ordering a *pro rata* distribution of the estate of one Kramer, who died insolvent in March, 1835, and disallowing the appellant's claim to a preference. The appellant had recovered a judgment against Kramer in 1831. By the statute of April 19, 1794, then in force, judgment creditors were allowed a preference over ordinary creditors in payment out of the estates of debtors who died insolvent. By the act of February 24, 1834, it was provided that judgment creditors should be paid *pro rata* with other creditors in such a case. The question was whether this latter statute was unconstitutional as applied to judgments previously recovered, and as to whether the appel-

lant, notwithstanding that statute, was entitled to the preference given by the act of 1794.

Porter, for the appellant.

Gibbon, for the appellee, was stopped by the court.

By Court, SERGEANT, J. The constitution of the United States, art. 1, sec. 10, declares, that no state shall pass any law impairing the obligation of contracts. The constitution of Pennsylvania, art. 9, sec. 17, prohibits the passage of any law impairing contracts. The latter instrument differs somewhat from the former in its phraseology, and was subsequently framed, but perhaps there is no difference between them in the substance of these provisions. A contract may be considered as impaired, when its obligation is impaired, for the obligation or means of enforcing the performance, constitutes a part of the contract itself.

These clauses had occasioned much subtlety of disquisition, and diversity of opinion. Analogy to decided points will prove a safer guide than entering into the wide field of elementary principles, to which the subject has a tendency to lead.

In *Ogden v. Sanders*, 12 Wheat. 213, it was finally held by the supreme court of the United States, that a state might, in the absence of a United States bankrupt law, pass a law discharging a person from debts to be subsequently contracted. As to antecedent contracts, it could only modify the existing remedy; but as to future contracts, it might control the remedy in every respect, and even take it away altogether.

By the act of twenty-fourth February, 1834, the legislature of Pennsylvania drew a distinction in the distribution of the assets of persons dying insolvent, between persons whose deaths occurred before the act commenced its operation, and those who should die afterwards. The former were left to the provisions of the act of 1794. For the latter a new mode of distribution was substituted, more equal in its nature, and giving no priority to judgment creditors over specialty and simple contract creditors. It is contended by the appellant, that the latter provision is unconstitutional, so far as concerns him, because, although the debtor died after the law went into operation, yet the appellant was a judgment creditor before its passage, and his claim would be diminished under the new law. It would seem, however, that it is the debtor's decease which ascertains the right of a creditor to a dividend of the assets, and that the contract is governed by that point of time, and not by the time

of contracting the debt. The provision is a future one, operating prospectively, and not affecting an antecedent right.

The rule of distribution is the remedy furnished by the law, on the occurrence of uncertain and subsequent events, namely the death of the party without payment, and the incapacity of his estate to discharge his debts. In such case the law steps in to provide a rule, founded either on principles of equity or public policy, which the legislature both of the province and state, have been in the habit of changing from time to time, according to the change of circumstances. Latterly many of the distinctions founded on the forms of contracting debts, such as the employment of seals, or securing them by matter of record, have been thought not justly to entitle a party to a preference over a simple contract debt; and an approach has been made to equality as the highest equity. What code of laws is applicable to the debtor's estate, has always been considered as ascertained by his death; that determines his domicile. Till then he may change his residence, and introduce a new code without any regard to the time of contracting the debts. Besides, it is right and convenient that the rule for settling decedents' estates, should be certain and uniform; but if the existence of a single judgment during the life-time of the debtor would be sufficient to coerce the application of a former code, notwithstanding he might die many years afterwards, the rule would be uncertain, depending on the will of the debtor and one creditor, although all the other debts were subsequent. There might be two different rules of distribution, applicable to cases essentially the same. The only event that can be considered as vesting any specific right or interest in the creditor, is the debtor's death. His insolvency is then ascertained; the consequences of the contract are consummated; the proportion has become a fixed and determined interest, and can not be divested. Before that time it is but a future and contingent right. In the case of *Commonwealth v. Lewis*, 6 Binn. 266, Chief Justice Tilghman states the difference between the two cases: "A general creditor has no right to any particular part of the estate of his debtor. If he wants to be secure, he should obtain a conveyance, or some kind of lien. A law which should deprive him of the benefit of a conveyance or lien by *ex post facto* operations, would be most unjust; but a man who trusts to the general credit of his debtor, has no right to complain, if, in case of deficiency of assets, he loses his debt in consequence of a law intended to operate for the pub-

lic benefit." In the present case, the assets are personal: the appellant's judgment was no lien upon them at the passage of the law, or when it commenced its operation.

We are therefore of opinion, that the distinction made by the legislature was not an infringement of the constitutional provisions referred to.

Decree affirmed.

STATUTES IMPAIRING VESTED RIGHTS OR THE OBLIGATION OF CONTRACTS.—For an extended discussion of this subject, see the note to *Goshen v. Stonington*, 10 Am. Dec. 134. As to the validity of state laws providing for the discharge of insolvent debtors, see *Smith v. Smith*, 3 Id. 410, and note; *Blanchard v. Russell*, 7 Id. 106; *Vanuxem v. Hazlehurst*, Id. 582, and note; *Smith v. Mead*, 8 Id. 183; *Mather v. Bush*, Id. 313; *Hicks v. Hotchkiss*, 11 Id. 472; *Smith v. Parsons*, 13 Id. 608; *Norton v. Cook*, 23 Id. 342 and note; *Frey v. Kirk*, Id. 581 and note. As to the validity of statutes relating to various other subjects, and assailed on the ground of their impairing the obligation of contracts, see *Trustees of the University v. Foy*, 3 Id. 672; *Jones v. Crittenden*, 6 Id. 531 and note; *Johnson v. Duncan*, Id. 675; *Starr v. Robinson*, Id. 732; *King v. Dedham Bank*, 8 Id. 112; *Lewis v. Brackenridge*, 12 Id. 228; *Coles v. County of Madison*, Id. 161; *Baily v. Gentry*, 13 Id. 484 and note; *Townsend v. Townsend*, 14 Id. 722 and note; *Barnet v. Barnet*, 16 Id. 516; *Tate v. Stooltsfoos*, Id. 546; *Bleakney v. Farmers and Mechanics' Bank*, 17 Id. 635; *January v. January*, 18 Id. 211; *Bowdoinham v. Richmond*, 19 Id. 197; *Tolen v. Tolen*, 21 Id. 742; *Aldridge v. Tusculumbia etc. R. Co.*, 23 Id. 307; *Trustees of New Gloucester School Fund v. Bradbury*, 24 Id. 515; *Derby Turnpike Co. v. Parks*, 27 Id. 700.

WORRALL v. RHOADS.

[2 WHEATON, 427.]

GRANT OF A RIGHT OF WAY WILL BE PRESUMED FROM AN UNINTERRUPTED enjoyment thereof for twenty-one years.

SUCH PRESUMPTION APPLIES TO A WAY OVER UNINCLOSED LAND, whether clear or woodland.

ERROR to the common pleas of Delaware county, in an action on the case for obstructing a right of way. Verdict for the defendant. The plaintiff brought this writ, alleging error in certain instructions given by the court, and in the refusal of instructions asked by the plaintiff. The instructions so granted and refused, so far as they concern the question decided by the supreme court, appear from the opinion.

Edwards, for the plaintiff in error.

Dick, *contra*.

By Court, KENNEDY, J. The only question presented by

the record of this case, in which the president judge of the court below can for a moment be supposed to have erred, arises out of his instruction to the jury on the second point submitted by the plaintiff's counsel. By this point the counsel requested the court to charge the jury, "that if they believed, from the evidence, that the plaintiff, or the occupiers of his farm, had used a way uninterruptedly upon and over the land of the defendant for more than twenty-one years, they had a right to presume a grant, whether the ground over which the way had been used, was improved or unimproved land." To this, although his honor, the president judge in his reply, did instruct the jury, that "such possession authorized the jury to presume a grant or conveyance of some sort of right of way," yet he seems to have neutralized or done away the effect of it, if not to have negatived it entirely as to this case, by saying at the same time, "I think the presumption of a grant may be weakened and rebutted by the nature and situation of the land over which the way is claimed, for I can not believe, that the mere traveling of a neighbor or neighbors in one track, etc., over uninclosed commons or uninclosed woodland, even for twenty-one years or more, ought to be considered as the adverse enjoyment of an easement, from which a jury should be bound to presume a grant, etc. And unless the jury in this case are bound to presume a grant of this right of way, which in our opinion they are not, the plaintiff has no right to recover."

By analogy to the statute of limitations of 21 Jac. I., c. 16, relating to lands in England, the general rule established on the subject is, that an uninterrupted enjoyment of such an easement as is claimed here, for the space of twenty years, un-answered and unexplained, affords presumptive evidence of title: *Campbell v. Wilson*, 3 East, 294; 2 Stark. Ev. 914, 5th Am. ed. And though this presumption may be repelled by evidence, which accounts for the possession or user, without resorting to a title, by grant or otherwise, yet I am not aware that, before this case, it was ever thought, much less adjudicated, that the circumstance of the land being uninclosed, whether clear or woodland, over which the way or road was used and occupied for the space of twenty-one years, or upwards, was sufficient to repel or rebut the presumption. It can not be pretended that one man has a right to enter or pass, even for a single occasion, upon the land of another, without some authority, either of law or by the consent of the latter, notwithstanding it may be clear or woodland uninclosed. And certainly much less can it

be claimed that he has a right to do so, and to use it at all times and continuously for all purposes as his right of way, as would seem to have been the case here, without having a title to warrant it. "The land," says the author of the Doctor and Student, diag. 1, c. 8, p. 30, "of every man is in the law inclosed from other, though it lie in the open field; and therefore, if a man do a trespass therein, the writ shall be *quare clausum fregit*."

So Mr. Selwyn, in his *Nisi Prius*, vol. 2, tit. Trespass, p. 481 (Wheat. ed.), lays it down that "the land of every owner or occupier is inclosed and set apart from that of his neighbors, either by a tangible and visible fence, as one field is separated from other by a hedge, wall, etc., or by an ideal, invisible boundary, existing only in contemplation of law, as where the land of one man adjoins to that of another in the same open or common field. Hence every unwarrantable entry upon the land of another is termed a trespass, by breaking his close." See also 3 Bl. Com. 209. And accordingly it was held by the supreme court of New York in *Wells v. Howell*, 19 Johns. 385, where the defendant's cattle entered the uninclosed field of the plaintiff, and destroyed the grass, etc., that the defendant was liable for the damages, in an action of trespass. For the same reason it is not justifiable for a man to enter the land of another with his cattle, because it lies open to the highway: 2 Roll. Abr. 565, l. 47; 6 Com. Dig., tit. Trespass, D, p. 383 (Rose's ed.) An action of trespass also lies for setting the end of a bridge on the plaintiff's soil, though a public highway: *Lade v. Shepherd*, 2 Str. 1004; or for erecting a stall in a market, without a license from the owner: *Mayor etc. v. Ward*, Id. 1238; S. C.; 1 Wils. 107. And trespass was held also to lie against a defendant, who was owner of the land, and a ferry right on one side of the Monongahela river in this state, for landing his passengers on the land of the plaintiff on the opposite side, though on a public highway: *Chess v. Manown*, 8 Watts, 219; see also *Chambers v. Furry*, 1 Yeates, 167, and *Cooper v. Smith*, 9 Serg. & R. 31 [11 Am. Dec. 658], where the same principle was previously settled and recognized.

Now according to the principle of all these cases, and the authorities cited, there seems to be no reason for making any distinction between the legal effect of a person's occupying, for the space of twenty-one years, a way over the clear land of another, which is inclosed by a visible fence, and his clear or woodland that is uninclosed, or inclosed merely by an ideal one. For all are considered as inclosed by the law; and the

owner is entitled to be protected in the quiet, exclusive, and undisturbed enjoyment of the latter description of land, as much, and to as great an extent as in that of the former. It is therefore obvious, that such an occupation of a way over either, is equally opposed to the absolute right and dominion of the owner over his land, and can only be lawfully exercised by another, either as a matter of right, under a grant from him, or by leave or favor. But in the absence of all evidence tending to show that such long-continued use of the way may be referred to a license, or other special indulgence, that is either revocable or terminable, the conclusion is, that it has grown out of a grant by the owner of the land; and has been exercised under a title thus derived; the law favors this conclusion, because it will not presume any man's act to be illegal. It is also reasonable to suppose that the owner of the land would not have acquiesced in such enjoyment for so long a period, when it was his interest to have interrupted it, unless he felt conscious that the party enjoying it had a right and a title to it, that could and ought not to be defeated. And beside, seeing it can work no prejudice to any one, excepting to him who has been guilty of great negligence, to say the least of it, public policy and convenience require that this presumption should be made, in order to promote the public peace, and quiet men in their possession: *Eldridge v. Knott*, Cowp. 215; *Hillary v. Waller*, 12 Ves. 252. Now from the evidence here it is abundantly clear, that the plaintiff, and those under whom he claimed, had been in the continued and uninterrupted use and enjoyment of the way, through the land of the defendant, for a period greatly above twenty-one years, not much short, indeed, if anything, of the time requisite to give a right by prescription; for it would seem to have been used by them as far back, and beyond the reach of the oldest witnesses produced, without the least title of evidence being given, which went to explain, qualify, or show that it was used under a license, or as a matter of favor, or otherwise than as a matter of right; "and therefore," as Lord Ellenborough says in *Campbell v. Wilson*, 3 East, 300, "comes to the common case of adverse enjoyment of a way for upwards of twenty-one years, without anything to qualify that adverse enjoyment."

We therefore think, that the court erred in instructing the jury as it did; and instead thereof, that it ought to have advised them, that it was their duty, if they believed the evidence, of which there could be no doubt, to presume a grant of the

right of way in favor of the plaintiff, which entitled him to the uninterrupted enjoyment of it against the defendant.

The questions involved in the third and fourth errors, were not made in the court below, and do not arise on the record, and therefore can not be considered.

The judgment is reversed, and a *venire de novo* awarded.

PRESUMPTION OF GRANT OF RIGHT OF WAY.—An easement in another's land, it seems, can not be acquired by the operation of the statute of limitations: *Cortelyou v. Van Brunt*, 3 Am. Dec. 479; *Cooper v. Smith*, 11 Id. 658. But a grant of such an easement may be presumed from a continued and exclusive possession and enjoyment with the acquiescence of the owner, for the statutory period: *Cooper v. Smith*, 11 Id. 658 and note. Therefore a grant of a right of way will be presumed from such an uninterrupted enjoyment, with the owner's acquiescence, for twenty years, but not for any shorter period: *Gayetty v. Bethune*, 7 Id. 188 and note; *Hill v. Crosby*, 13 Id. 448; *Turnbull v. Rivers*, 15 Id. 622. But the presumption of such a grant may be rebutted by showing that within the twenty years the owner plowed up the way and declared that the claimant had no right of way: *Barker v. Clark*, 17 Id. 428. To establish a right of way by prescription, it must be shown that the use was adverse to the owner of the soil: *Lawton v. Rivers*, 13 Id. 741; *Rowland v. Wolfe*, 19 Id. 651. That an uninterrupted adverse user of a right of way for twenty-one years or more, under a claim of right, and not by virtue of a mere license, affords a presumption of a grant, is a position for which *Worrall v. Rhoads* is recognized and approved as an authority in *Eeling v. Williams*, 10 Pa. St. 128, and *Steffy v. Carpenter*, 37 Id. 44. So where the way is over uninclosed woodland: *Reimer v. Stuber*, 20 Id. 464, following *Worrall v. Rhoads*.

BALL v. SLACK.

[3 WHARTON, 506.]

GRANT OR SURVEY BOUNDED ON A RIVER OR CREEK in this state extends to the river or creek, and except in the case of large navigable streams, to the middle of the creek, and no other person can come between the grantee and the stream and cut him off from it.

COURSES AND DISTANCES ALONG A STREAM RETURNED as the line of a grant or survey, are to be disregarded so far as they do not agree with the line of the stream.

MOUTH OF A CREEK emptying into a tide-water stream is the point at which it discharges its waters into the stream, and not the point at which its current is stopped by tide-water, and is the same at high as at low water. Hence, a grant described as beginning at the mouth of such a creek begins at low-water mark, on the stream into which it empties, and at low-water mark on such creek.

LAND BETWEEN HIGH AND LOW-WATER MARK.—The right to land between low water and ordinary high water on a stream in which the tide ebbs and flows, is in the owner of the adjacent fast land as against an intruder, subject to the use of it by the public as a common highway.

POSSESSION OF THE FAST LAND is possession of the flats in such a case, and is not interrupted by the passage of boats and other craft over the flats at high water.

RIGHT TO BUILD WHARF BELOW HIGH-WATER MARK.—A third person has no right to erect a wharf on the land below high-water mark on a tide-water stream, or on a creek emptying into it, without the permission of the owner of the adjacent fast land.

SHIFTING OF MOUTH OF CREEK WHICH IS BEGINNING POINT.—Where the mouth of a creek, which is the beginning point of a grant bounded on one side by such stream, shifts gradually, owing to the action of the creek and the stream into which it empties, the change operates to the gain or loss of the parties on the respective sides of the creek; but if it is occasioned by the act of one of the parties, the other party is not injured thereby.

TRESPASS quare clausum fregerunt. The question was as to the right of the defendants to erect a certain wharf on the flats on the northern bank of Gunner's creek, near the mouth thereof, below the point where the current of the creek is stopped by tide-water from the Delaware river, into which it discharges its waters. The description of the land contained in the original grant to one Gunner Rambo, under which the plaintiffs claim the *locus in quo*, is sufficiently stated in the opinion, as also the description of the land contained in a subsequent conveyance from Anthony Palmer to the ancestors of the plaintiffs. The defendants claimed, through mesne conveyances, under a conveyance from Anthony Palmer, dated May 16, 1744, which described the premises conveyed as follows: "A certain lot or piece of land, situate in Kensington, in the township of the Northern Liberties, and county of Philadelphia, containing in breadth, on Queen street, or the road to Point-no-Point, seventy feet; and extending in depth from the said road, down to low-water mark of the Delaware river; bounded south-westward by John George Rees' lot, north-westward by said Queen street, north-eastward by land of William Shippen, and south-eastward by the river Delaware." This lot adjoined the plaintiffs' on the south. The north line of it was north of the point where Gunner's creek, at low water, empties its waters into the Delaware, if the lot should be continued between parallel lines to low-water mark. The defendants procured a license from the board of wardens, in 1829, for the erection of the wharf in question. It seemed that the wharf was erected on the flats between the plaintiffs' fast land and Gunner's creek. There was an agreement by counsel, that the verdict should be for the defendants, under the instruction of the court that the plaintiffs' title commenced at high-water

mark on the fast land, without prejudice to the rights of either party, or inference from the finding of a jury; the court to have the power, on the judge's report of the evidence, to decide any question of fact, or to order a new trial; and all other questions of law to be considered as reserved. Some additional facts are stated in the opinion. A great mass of parol testimony was introduced on both sides, but it is not necessary that it should be stated, as the points decided by the supreme court are sufficiently clear without it.

C. and J. R. Ingersoll, for the plaintiffs.

Scott and Sergeant, for the defendants.

By Court, HUSTON, J. This was an action of trespass; and the cause turned on the construction of the grant or grants, under which the plaintiffs claimed; for if the right to the *locus in quo* was in the plaintiffs, the defendants were wrong-doers.

At the opening of the case I was disappointed, in that a more careful search for original papers had not been made in the land office, and for the deed from Gunner Rambo to Major George Lillington, and other deeds from that time down. Those papers might, and I still suppose would have put at rest all the disputed facts in this cause.

We must, however, decide on what is before us; and when the cause comes again before a court, if there is other evidence, they must decide on that. The last part of my remark will not be disputed; but long experience has taught me that where a new trial is granted by this court, the cause goes back with a heavy weight in one of the scales, and it is always asserted, and sometimes believed, that a different result can not be given to the cause, without disrespect to this court: whereas in truth every original title may, by long use, by long neglect, by long intrusion of others, or by many other matters, be limited or extended, especially where the boundaries are in any degree vague; and in all new trials it is possible, there may be a different finding of the facts, and different evidence from that at first adduced.

The original grant under which the plaintiffs claim, as exhibited to us, in what I suppose to be what is since called a warrant of acceptance, is in these words: "The first piece of land beginneth at the mouth of Gunner's creek; from thence running up the several courses of Delaware river to a corner post of Peter Nelson's land; then north sixteen degrees west by said Nelson's land, one hundred and ten perches to a corner white oak

standing near unto the above said Gunner's creek; from thence following down the several water-courses thereof to the place of beginning; being fifty-four acres of land, swamp and cripple." The grant is to Gunner Rambo, old renter. I need not recite the course, etc., of the other parcels granted; the one of them is of swamp, meadow, and cripple, between Nelson's fast land and the Delaware. This land granted to Rambo, and other adjoining land, had become the property of Anthony Palmer, who on the twenty-first of March, 1728, granted to the ancestors of the plaintiff six hundred and seventy-six acres, besides the flats thereto belonging. The description is: "Beginning at the mouth of Gunner's creek and running up said creek on the several courses thereof two hundred and ninety-one perches to a line of Robert Rawle's land;" it then gives the courses and distances, and corners and names of those on whom it bounds till it strikes another creek; "thence down the same two hundred and forty-seven perches to the river Delaware; thence down the said river five hundred and seventy-two perches to the beginning."

The proof is, that the tide went up Gunner's run a mile or more; and on the twenty-fourth of February, 1770, an act of assembly was passed, authorizing the owners to protect the low lands on this creek from being overflowed, by a dyke or bank, and a sluice or sluices in it.

If there is any point settled in Pennsylvania relating to land titles, it is that where a grant or survey is bounded on a river or creek, it extends to that river or creek, and except in the case of large navigable streams, extends to the middle of the creek; and whatever may have been or may be imagined in this vicinity, I think that where a man's grant or his survey calls for a creek or river, no lawyer of any reputation would contend that another could come between him and the creek or river, and cut him off from it; and where the courses and distances on the creek or river are given, and on examination it is found, they do not closely follow the stream, it does not alter the case. A surveyor can not run a curve line with his compass; and courses and distances may have been taken incorrectly; or an error may have been made in making out the return of survey; but if a creek is returned as the line, there can be no mistake as to it; it is the line; and courses and distances along it are disregarded.

I do not understand that in this case these principles have been denied or controverted. The contest is not whether the

plaintiffs' right extended to Gunner's run; but where Gunner's run or the mouth of Gunner's run is; and this again is subdivided.

I shall not examine the doctrines and cases of construction of grants, for the cardinal one supersedes inquiry as to the rest. I mean that every grant is to be construed according to the intention of the parties. The grant is to begin at the mouth of Gunner's run and to extend up it by its several courses: there is no ambiguity in this; if there had been, universal usage and uniform decision have affixed the meaning.

The mouth of Gunner's creek must mean the place where it discharges its waters into the Delaware; if it meant the point beyond which the tide did not stop its current, or swell beyond its bank, then the mouth was a mile from the spot in dispute; which is not pretended. But it is contended that this grant means, "beginning at high-water mark above the mouth of Gunner's run;" but this would be a different grant, and as high-water mark for a mile up the creek was different from the channel of the creek at low water, this construction would cut Rambo from this creek; he would touch it nowhere; and besides, what meaning must we give to the words, fifty-four acres of land, swamp and cripple?

It is contended, that flats are different from swamp and cripple; it may be so; since this grant, however, we have proof that more than one range of timber and board-raft have lain at high tide and low tide on what are now called flats; and a hundred small craft have been passing over these flats daily; and it is possible that vegetation extended at one time much nearer the low-water mark of the river and creek than it now does. I shall suppose, however, that in this respect, the appearance was always what it now is.

We then come to the question, what right has the owner of land adjoining and bounded by the Delaware or Schuylkill, to the ground over which the tide runs every day, and which is left free from water every day? This, if it is still a question, is an important question. The general proposition, that the owner has a right, restricted by the fact, that the river is a highway, does not seem to be denied; for the defendant showed a deed for the flats between his fast land and low water, and claims to low water by that deed, and puts his right to go beyond low water, on permission of the wardens.

It seems to me, that writers and courts from Sir Matthew Hale to this time, agree on this subject; different cases have

brought the question in different shapes before courts. It seems agreed, that between low water and ordinary high water of the ocean, and wherever the tide ebbs and flows, is part of the common highway, over which all citizens and aliens may sail. In England, this is said to be vested in the king; here it is in the state. There and here, originally, goods might be landed anywhere, on permission from the owner of the adjacent lands; now in both countries, on account of revenue, ports of entry are established, at which alone certain goods can be legally landed, except in case of storm or distress.

There and here the government have exercised the right of building wharves, etc., for the improvement and convenience of trade, on the intermediate space between high and low tide, and beyond low tide; but I know of no instance, either in that country or this, where it has been held that one man can, of his own right, or by the permission of any officer of government, build a wharf on the property of his neighbor. I do not say anything of acts of the legislature, for the improvement of a city or port, where, if the owner refuses, certain persons may erect for him, and charge him with the expense; such or similar laws have been; I am not speaking of such cases.

Our acts of assembly would seem to have recognized the right of the owner to erect wharves down to low-water mark. The act of the seventh of February, 1818, is supposed to have limited this, and to have required the sanction of the wardens even for this. I do not consider it necessary to discuss this point; at all events, the person applying must show a right to the place to the wardens; but their permission is not evidence that he has a valid right; they have no power to cite parties or try titles; but it shows, that none could lawfully build a wharf, but he who had a right to the place where it is built.

We come back to the question, was the land where this wharf is erected, the property of the plaintiff? A good deal was said about the right of fishing being limited to a right-angle line from the shore. The act of 1809, section 10, provides, "that if any person or persons whatever shall cast or lay out any seine or net into the river Delaware, within the jurisdiction of this state, beyond the right angle of the shore, and where his line strikes the river at low-water mark, in going out, or suffer it to swing beyond the right angle of the shore of the river, and where his line strikes it at the water mark coming in," etc. The act of 1785, in the sixth section, says: "Where two live adjoining each other on the same side, each shall have the right

of fishing opposite his own land; the position of which pool is to be by continuing the course of the division line or lines of the persons next adjacent." This act relates to the Schuylkill. There is nothing in these acts in favor of the defendants; and they show the understanding of the legislature, that the owner of the fast land had a right between high and low-water mark; the extent of which on the river, was to be ascertained by continuing the lines of his land which came to the bank of the fast land. The line of the plaintiff is Gunner's creek. Gunner's creek is where the water of that creek flows, when the tide permits it to flow; and the mouth of Gunner's creek is where it flows into the Delaware, when the tide permits it to flow; and is the same at high water as at low water.

As to the possession of the plaintiff: possession of the inclosed land is possession of the flats. That rafts and boats at high water, passed over the flats, amounts to nothing. The right of the plaintiff was subject to this right in the public at high water; but this right of the public to sail over the flats in high water, is totally different from the right of an individual to erect a wharf, and keep possession for his own emolument, at all states of water.

There were two papers offered; one was what was called Lewis Evans' plot of the Palmer estate, on the opposite side of Gunner's creek. I do not say that in no case can a draft of adjoining lands, though not in the land office, be given in evidence in a contest about the extent and boundary of adjoining land. This purports to be a solemn partition of land by heirs, accompanied by a draft; but it does not extend as an act of the parties, to Gunner's creek; the south-west side of Gunner's creek from the road, and for some distance down the road, was not included in the partition then made; it is stated to be the property of Dr. Shippen, in fee. The surveyor ascertained the lines of it, where it adjoined the lands of Palmer's heirs; though his doing so would not bind Dr. Shippen; much less can the courses and situation of the creek and river, at a distance from the Palmer estate, affect the plaintiff. There is no presumption that the creek and river were laid down from actual survey. His duty did not require him to survey them. And if it had been observed that the land south-west of the creek had not been the subject of partition, and that no courses and distances were set down along that part of the creek or the river, I think it would not have been admitted.

The paper in the handwriting of John Lukens was also admitted. It is thus: "Sixteenth March, 1773, being called upon to go in company with Hugh Roberts, Joseph Fox, and Charles West, to the bridge over Gunner's run or creek, on the road to Point-no-Point, and after placing a surveying instrument over where they said the middle of the creek formerly was, they set the course to the place they said the creek's mouth at low-water mark was. The same was found to be S. 7° E. from the same station the chimney of Marmaduke Cooper's new house bears, S. 15° E., and the steeple of Christ church bears S. 43° 45' W. Carefully examined," etc. The acts, and in some cases the declarations, of a surveyor, when executing a warrant, are evidence: but after a survey has been executed and returned, neither his acts nor declarations can affect the right of the owner. But the objection to this paper is, in addition to what I have said, that we don't know the gentlemen named; we don't know, and nothing in this case raises even a presumption, that either of them had any interest in the lands, even near this spot. The mouth of the creek is taken from their information; John Lukens doesn't pretend that he saw it. Now it will not do that a title shall depend on the parol declarations and unofficial acts of any men, however respectable they may have been. The law for embanking out the tide had passed in 1770, and it is probable they met to settle something, or some right up the creek.

The case of *Blundell v. Cotterell*¹ decides that although the king or the public may sail over land covered by the tide when up, yet the owner of the adjacent fast land can support trespass against one entering on and exercising acts of ownership, at low water. And it must be so; if wharves can be erected between a man and the river, why not houses? And if he has no remedy, a stranger or strangers may come between him and the river, and make his farm what is called a dry-land farm; he may have no place at which to water his cattle. We are then of opinion the plaintiff has a right to the run and to half of the run: if the boundary of the run on his side is flats covered with water at high tide, still he has such right to and interest as that no person can come between him and the run, or erect a wharf or anything else on the plaintiff's side of the run; and that this right extends to the river at low-water mark, and to the mouth of the creek at low-water mark.

There is some contrariety in the testimony as to where the

1. *Blundell v. Cotterell*, 5 Barn. & Ald. 268.

mouth of the run was, and where it is: if it is different from what it was, if this change has been gradual, and arising from the creek and river solely, the alteration is the gain or loss of the different owners on different sides; but if it has been occasioned by the acts of the parties, the act of one party shall not injure the other. We hear of a dam on a creek breaking, of the channel of the creek having at that time been obstructed by loaded arks lying in it or sunk in it, and that this forced the current across the plaintiff's flats and wore a channel above the former mouth of the creek; if this were so, it will not alter the right of the plaintiff; we are told the wharf is built so as to obstruct half the channel of Gunner's creek, and that above the wharf material was taken to fill the wharf, and that thus part of the present outlet of the creek is above and part below the wharf; if this be so, and the change was the consequence of acts done by the defendants, this will not alter the right, nor give to one or take from the other. With these observations we leave it: if the defendants please they may have a new trial as to where the mouth of Gunner's creek was and is, and if there is any change, how it was produced.

WATER-COURSE AS BOUNDARY.—The subject of navigable rivers as boundaries, and of the ownership of the shore between high and low-water mark, is discussed at considerable length in the note to *Arnold v. Mundy*, 10 Am. Dec. 356. See also *Carson v. Blazer*, 4 Id. 463; *Storer v. Freeman*, Id. 155 and note; *Browne v. Kennedy*, 9 Id. 503; *Hooker v. Cummings*, 11 Id. 249; *Ex parte Jennings*, 16 Id. 447; *Lansing v. Smith*, 21 Id. 89; *Chapman v. Kimball*, Id. 707; *Barker v. Bates*, 23 Id. 678 and note. As to the extent of grants bounded upon non-navigable streams, see *Home v. Richards*, 2 Id. 574; *Hooker v. Cummings*, 11 Id. 249; *Ingraham v. Wilkinson*, 16 Id. 342; *Ex parte Jennings*, Id. 447 and note. The principal case is referred to in *Gough v. Bell*, 22 N. J. L. (2 Zab.) 469; *Bell v. Gough*, 23 Id. 677; and *Clement v. Burns*, 43 N. H. 618, as authorizing the conclusion that in Pennsylvania a grant of land bounded on a navigable stream extends to low-water mark. This is disputed, however, in *McManus v. Carmichael*, 3 Iowa, 34, where it is said that there has been a general misapprehension of the Pennsylvania decisions on this point, and that the learned American editors of Smith's Leading Cases have shared in this misapprehension in their citation of *Hart v. Hill*, 1 Whart. 124, and *Ball v. Slack*, as authorities for the doctrine that the ownership of the soil extends to low-water mark in such cases in that state. After referring to *Hart v. Hill* as a case of a several fishery, and therefore not in point, Woodward, J., who delivered the opinion in *McManus v. Carmichael*, said: "In *Ball v. Slack*, 2 Whart. 508, the reporter's abstract says: 'It seems that the owners on the Delaware and Schuylkill have a right to the land between high and low-water mark, subject,' etc. It may be doubted whether even this is warranted by the opinion, but admitting that it is, the law there is distinctly settled to the contrary in *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 463; and *Shunk v. Schuylkill Navigation Co.*,

14 Serg. & R. 71. Many inaccurate expressions have been used in the cases in that state, relating to fisheries, which have led to confusion, but the subject is much cleared in the two cases above cited." The doctrine really held in Pennsylvania is, however, substantially in accord with the principal case. It is that a riparian owner on a navigable stream takes absolutely to high-water mark, with a qualified right to low-water mark; that is, a right which is limited only by the public right of navigation over it, when the tide is full, and of improving the stream as a highway: *Stover v. Jack*, 60 Pa. St. 343; *Tinnicum Fishing Co. v. Carter*, 61 Id. 30; *Wainwright v. McCullough*, 63 Id. 74; *Wood v. Appal*, Id. 221, all citing *Ball v. Slack* as an authority to the same effect. It is cited also in *Covert v. O'Conner*, 8 Watts, 477, to the point that the law is settled in Pennsylvania, that where land is bounded on a river or creek it extends to the river or creek, and if not navigable, to the thread of the stream. It is referred to also in *Borough of Frankford v. Lennig*, 2 Phila. 409, as an authority for the doctrine, that where the mouth of a creek shifts gradually, owing to natural causes, the channel shifts with it, but it is otherwise if the change is sudden, resulting from a flood or from an obstruction in the stream.

DECKARD v. CASE.

[5 WATTS, 22.]

PARTNER MAY TRANSFER THE WHOLE STOCK IN TRADE of the partnership *bona fide* in payment of debts of the firm, especially where his copartner has absconded, and the fact that the assignment is under seal is immaterial.

EMPLOYMENT OF THE PARTNER who made the transfer, and the resumption of business at the shop formerly occupied by the firm, if not a part of the consideration of the transfer and not *mala fide*, will not render such transfer fraudulent as against other creditors of the firm.

ERROR to the common pleas of Perry county, in an action of trespass on the case against the defendant Deckard, for levying an execution on certain carriages, wagons, etc. It appeared that the property had formerly belonged to Lowe and Mead, partners in the wagon-making business; that the plaintiffs and others, having judgments against the firm, caused a levy to be made on said property by the sheriff, who took it into his possession; that Mead having absconded, Lowe agreed with certain of the creditors to transfer all the stock in trade of the firm to the plaintiffs, in consideration of their assuming to pay certain debts of the firm, including those for which the levy had been made; that he made such transfer accordingly, by an assignment under seal, and the sheriff thereupon delivered the property to the plaintiffs, who rented the shop formerly occupied by the partners, and took the goods back there, and began to carry on the same business, employing Lowe as one of their workmen; that about fourteen months afterwards another credit-

or of Lowe and Mead, having obtained execution against them, placed it in the defendants' hands, and he, having been indemnified by the creditor, levied upon the goods. The court below instructed the jury that the fact that the assignment included the whole stock in trade of the partnership and was under seal, and executed by only one of the partners, did not render it invalid, but that if the jury should find that the employment of Lowe was a part of the consideration of the transfer, it was fraudulent and void. Verdict and judgment for the plaintiffs, which the defendant brought error to reverse.

McKinney and Alexander, for the plaintiff in error.

Watts and Penrose, for the defendants in error.

By Court, ROGERS, J. It is a general principle of the law of partnership, that the partners are bound by what is done by each other in the course of the partnership business. They are considered as virtually present at and sanctioning the contracts they singly enter into in the course of trade; and each is vested with authority to act at the same time as principal, and as the authorized agent of his copartners. Each partner reposes confidence in the other, and by the act of entering into the partnership, constitutes him his general agent as to all the partnership business. These principles are established for the benefit of the partners themselves; for it would be a great impediment to commercial dealings if, in the ordinary transactions of trade, it were necessary that the actual consent of each partner should be obtained; or that it should be required, that the transaction should be really for the benefit of the firm. When, therefore, the act of one has the appearance of being on behalf of the firm, it is considered as the act of all. Among the powers most ordinarily exercised by partners, is the *jus disponendi*, or the power which each partner, individually, has of disposing of the joint stock or merchandise. But it is contended that these powers are subject to certain limitations; and on the authority of Justice Washington, in *Pearpoint and Lord v. Graham*, 4 Wash. C. C. 234, it is said to admit of serious doubt whether one partner can, without the consent of his associates, assign the whole of the partnership effects (otherwise than in the course of the trade in which the firm is engaged), in such a manner as to terminate the partnership. Justice Washington inclines to take a distinction between a voluntary act of a partner, and those cases where, by the act of God, or by the operation of the law,

the partnership is dissolved, as by death or bankruptcy of a partner.

But why should the disposal of the whole stock in trade necessarily dissolve the partnership? The transaction may be for the benefit of the concern, and may increase, rather than diminish the ability of the firm to continue their business. It is admitted he can sell part without the actual consent of his associates, and the policy of limiting that right is not very apparent, where the transaction is concluded in good faith; still less in a case like the present, where the arrangement is most clearly for the benefit of the firm. For had the property been sold by the sheriff in its unfinished state, it would have been attended with the sacrifice of the interests of all the parties. Mead, aware that the property had been taken in execution, abandoned all care of it. From necessity, then, the other partner should have the power of disposal, in payment of the debts of the firm. It can not, with any propriety, be considered as a voluntary act of disposition, but some arrangement was required to relieve the property from the custody of the sheriff. But is the power so limited as that one partner can not dispose of the whole of the partnership effects? In *Fox v. Hanbury*, Cowp. 445, Lord Mansfield held, that each partner has a power singly to dispose of the whole of the partnership effects. The authority is implied from the nature of the business. Justice Brainard, in 4 Day, 430,¹ expresses the opinion that one partner has the absolute power of disposing of the whole. And in *Harrison v. Story et al.*, 5 Cranch,² it is held, that one partner may, in the partnership name, assign the partnership effects and credits in trust for creditors of the firm. The case of *Duherse v. Legeon*,³ 1 Desau. Ch. 537, would seem to have been put on the ground of fraud, and certainly the transaction must be free from every taint of fraud; but when the assignment is *bona fide*, I can not doubt the power of one partner to transfer the whole, as well as a part of the partnership effects. Nor do I think it can make any difference in passing the interests of the firm, when the property has been delivered, whether the instrument of transfer be under seal or not. The assignment transfers the whole right of the firm, and not merely the right of Lowe. It purports to assign the whole interest, and contains warranty against all persons whatsoever.

There is no ground to say, that there was fraud in the contract. The fact of fraud was left by the court to the jury, and

1. *Mills v. Barber*.

2. *Harrison v. Story*, 5 Cranch, 280.

3. *Dickinson v. Legare*.

they have found that the contract was *bona fide*. Nor has the plaintiff in error a just cause to complain of the charge in relation to legal fraud. At the time of the agreement, the property had been severed from the possession of the debtor, and was afterwards retransferred to the premises from which it was taken.

The levy was made upon all the property of the defendant: after the levy, it was removed to an adjoining warehouse and held by the sheriff in custody for several days; and when so sold, the contract was made for a valuable consideration. The shop to which the property was retransferred was rented by the vendees; it was under their superintendence and care; they hired the workmen, purchased the materials, and continued the direction of the concern for fourteen or fifteen months.

There is nothing in all this, either fraudulent in fact or forbidden by the policy of the law. Nor will the fact that the plaintiff employed Lowe as a journeyman, affect the transaction, unless his employment was a part of the consideration of the contract.

Judgment affirmed.

PARTNER HAS POWER TO SELL ALL THE GOODS of the firm without the consent of his copartner: *Montjoy v. Holden*, 12 Am. Dec. 331. So an assignment under seal, of the effects of the firm, by one or more of the partners for the payment of the firm debts, binds the rest: *Robinson v. Crowder*, 17 Id. 762. Either of the partners before the dissolution of the firm, or all of them afterwards, may appropriate the partnership funds to the payment of one creditor in preference to others. But on the dissolution of the firm by the death of one partner, none of the survivors can, without the consent of the others, assign the whole interest in the partnership effects to trustees for the benefit of preferred creditors; and as to whether one partner can, during the existence of the partnership, assign the partnership effects in the name of the firm for the benefit of a preferred creditor, but against the consent of his copartners, *quære*: *Egberts v. Wood*, 24 Id. 236, and see the note to that case. That one partner has power to assign and transfer the whole stock of the firm, if the transaction is *bona fide*, is a position for which *Deckard v. Case* is recognized as authority in *Hennessey v. Western Bank*, 6 Watts & S. 310; *Moddewell v. Keever*, 8 Id. 64; *Tapley v. Butterfield*, 1 Metc. 519; *Forbes v. Scannell*, 13 Cal. 288; *Bowen v. Clark*, 1 Biss. 134. But he can not convey the realty of the firm, either by assignment or deed, nor can he make any written or verbal contract specifically enforceable against his copartners: *Ruffner v. McConnel*, 17 Ill. 217, also citing the principal case.

In *Bowen v. Clark*, 1 Biss. 128, it is held that an assignment with preferences by two members of a firm, in the absence and without the knowledge of their copartner, who had previously refused to give any preferences to any of the creditors, was not valid as to him. In *Moddewell v. Keever*, 8 Watts & S. 64, Chief Justice Gibson, while conceding that "perhaps" a partner may assign the whole effects of the firm, as laid down in *Deckard v. Case*,

says that he can only do so as an agent of the firm and in its name, but not by any separate act or by suffering the property to be taken for his separate debt.

POWER OF PARTNER TO BIND COPARTNERS BY SEALED INSTRUMENT: See *Robinson v. Crowder*, 17 Am. Dec. 762; *Hart v. Withers*, 21 Id. 382, and *Cady v. Shepherd*, 22 Id. 379; *Morse v. Bellows*, 28 Id. 372, and other cases in this series cited in the notes thereto. See also *Fichthorn v. Boyer*, *post*.

EBAUGH v. HENDEL.

[5 WATTS, 43.]

CORPORATOR NOT LIABLE TO USURPERS OF FRANCHISE FOR CORPORATE DUES.

A member of a religious corporation is not liable for pew rents, where intruders, without authority from the charter or the law, take possession of the church, expel the vestry and choose a new one, although such member retains his pew but refuses to occupy it.

ERROR to the common pleas of Cumberland county, in an action to recover certain pew rent for two years, from October 1, 1830, which action was brought into that court by appeal from a justice. The action was brought in the name of the trustees, etc., of the German Reformed church of Carlisle for the use of John S. Ebaugh; the vestry of said church, as now constituted, having voted the pew rents to the said Ebaugh in compensation for his services as pastor. It was proved, on the part of the plaintiff, that the defendant had occupied the pew in question prior to October 1, 1830, and that some time in the spring of 1832, when applied to by a person who wished to rent the pew, to know whether he was going to occupy it or not, he said that he was not willing to give it up, but that he would not pay rent for it unless compelled, and that he would keep it until Mr. Ebaugh left the church, when he would occupy it himself. It appeared that he had not occupied the pew during the period for which pew rent was claimed. It was further proved, on the part of the defendant, against the plaintiff's objection, that prior to October 1, 1830, the defendant was a member of the church in question, and was also a member of the vestry or corporate body thereof; that the said Ebaugh was, prior to that time, pastor of the said church, but had been convicted by the proper church tribunal of certain immoral conduct, which conviction had been approved by the German Reformed synod and the pulpit declared vacant; and that the said Ebaugh was notified by the vestry that his services as pastor were no longer required; that on October 9, 1830, at a time when no such meeting or election was provided for by the charter, a number

of persons, many of whom had not previously been members of the congregation, met at the instance of the said Ebaugh, declared themselves a congregation independent of the synod, elected Ebaugh as pastor, declared the vestry of the corporation then in office, of whom the defendant was one, unworthy to hold said office, expelled them therefrom, and elected a new vestry, took forcible possession of the church building, and expelled the defendant from the church and from the privilege of worshipping there. Other facts appear from the opinion. Verdict and judgment for the defendant, to reverse which the plaintiff sued out this writ of error. The chief question was as to the admissibility of the evidence introduced by the defendant. There was a question also as to the admissibility of evidence offered by the plaintiff to show that one of the vestrymen in office prior to October 9, 1830, was not regularly elected, and that Ebaugh had been duly installed as pastor, said evidence having been rejected by the court.

Penrose and Carothers, for the plaintiff in error.

Watts, for the defendant in error.

By Court, GIBSON, C. J. The question is whether the defendant was bound to resign his corporate franchise, or succumb to those who had seized on the corporate authority. Where the acts of a corporation are in conformity to the charter, there is perhaps no choice for a dissatisfied corporator but that which lies between submission and secession; but he is not to be put to this choice by an irruption or a rebellion. He may have a stake of too much value to be surrendered without a struggle for it. What was the defendant's position? The legitimate authorities of the corporation had been supplanted by force or fraud; and the actual government, during the time for which it is attempted to charge him with corporate dues, was a gross usurpation. The pastor to whose use the action is marked, having been separated from the communion of the German Reformed synod to which both he and the corporation were subordinate, and having been displaced by the vestry, got together a meeting of various people, mostly strangers, but calling themselves pew-holders, who declared the congregation independent, reinstated the minister, turned out the vestry, chose a new one, and took possession of the church. The meeting not being held on a charter day, or any day appointed by a by-law, was a surreptitious one. The declaration of independence and choice of a minister whom the synod had dis-

abled, were palpable infractions of a leading article of the constitution, which prescribes that "no minister of the gospel shall be elected pastor of said congregation, unless he be in full communion with the German Reformed church." The election of vestrymen was otherwise illegal, as there were no vacancies to be filled; and, to finish as it had begun, the dominant power transferred the corporation's claim on the defendant, as a contributor, to the leader of the confederates by whom he had been thrust out of office as a vestryman. Now, it is admitted that his dues would have been suspended by an expulsion or a forcible disturbance of him; and was he not disturbed by a species of moral force? The obligations of the parties were reciprocal; and when the corporation ceased to protect him in the possession of his corporate rights, whether from disability or disinclination, it ceased to have a claim on his corporate duties. It was to hear the gospel preached by a minister whose commission should bear the seal of the German Reformed synod, that he had become a member of the congregation—a benefit that was denied him—and though the preaching of the intrusive minister was accessible to him, it wanted the sanction of the synod—that assurance of scriptural truth for which he had stipulated, and whose importance all, who have been taught to rely on the doctrines of a particular communion, can appreciate. But he was ejected from a corporate office derived, in part, from congregational membership; and that, alone, would absolve him from congregational duties. The questions of evidence and direction, are all resolvable on this principle; and the record is, in all respects, free of error. Judgment affirmed.

ARMSTRONG v. CITY OF LANCASTER.

[5 WATTS, 68.]

DERIVATION OF AN EQUITABLE PLAINTIFF'S TITLE FROM THE LEGAL PLAINTIFF need not be set out in the declaration, where a recovery on the naked legal title would be a conclusive bar to a subsequent action by any one, but it will be sufficient to mark the suit to the use of the equitable plaintiff; as in the case of an action brought in the name of an assignor to the use of his assignee.

REJECTION OF EVIDENCE OF AN ASSIGNMENT by the legal to the equitable plaintiff in such a case, though such evidence is in itself irrelevant, is a ground for reversal where it appears that the want of such evidence was regarded on all hands as an insuperable barrier to a recovery.

ERROR to the district court of Lancaster county, in an action

of assumpsit for work and labor by James Armstrong, surviving partner of the late firm of Armstrong & Atkinson, for the use of George Markley. The plaintiff offered in evidence the assignment by Armstrong to Markley with parol proof that the consideration thereof was money and goods furnished to the firm, which evidence being rejected, the plaintiff excepted, and after verdict and judgment for the defendant, brought this writ of error.

Eastburn, for the plaintiff in error.

Champneys, for the defendant in error.

By Court, GIBSON, C. J. We have heretofore intimated that the title of an equitable plaintiff need not be traced from the legal plaintiff by averment, or otherwise indicated than by marking the suit to his use. A legal title is certainly sufficient for the maintenance of an action, except, perhaps, where the commonwealth stands as a trustee in an official bond; and there it may be necessary to show a particular injury as a title to her interference, in order to secure the obligor from an officious intermeddling. But to incumber the pleadings, in ordinary cases, with immaterial suggestions, would be not only unnecessary, but prejudicial, by reason of its tendency to complication and the introduction of irrelevant proof. The court will undoubtedly search out the actual plaintiff, where it is necessary, and fix on him the responsibility of a party, by subjecting him to costs, a plea of set-off, or any other liability that may be necessary to protect the defendant; but here, where a recovery on the naked legal title would have been a conclusive bar to another action by any one, to set out the equitable title in the declaration was unnecessary. The equitable owner of a right of action can recover on the legal title only; and any one attempting to use it a second time, would be repulsed at once by a plea of former recovery.

Of all the parties concerned, the ostensible defendant had least to do with the equitable ownership. But there may be adverse claimants of it; and how are the rights of a party, not named in the record, to be protected? Certainly not by preventing a recovery and extinguishing the expectations of himself and every one else. If this judgment were affirmed, the party who maintained the contest, under the defendant's shield, would have concluded himself, as well as his competitor. What, then, was his most available course? Obviously to lie by till recovery, or to promote it: then to arrest the money in

the sheriff's hands by notice not to pay it over, rule it into court, and move for leave to take it out. This done, the pretensions of the claimants could be determined by the court, or a jury, under an issue, as the case might require. Or perhaps the question might be properly, though not so conveniently, determined before recovery, on a motion to strike out the name of the one claimant and insert the other. But the court might properly suspend its decision, till it were ascertained by recovery that the parties were not fighting for a shadow. Either of these courses will be open to the counsel who claims the fund for the partnership creditors. The only difficulty in the way of reversal, is found in the fact that the evidence of ownership was irrelevant, and that the exclusion of it was consequently not strictly prejudicial to the right of recovery. The want of the evidence, however, was considered, on all hands, as an insuperable barrier; and justice requires that the cause be sent to another jury, on the issue between the legal parties.

Judgment reversed, and a *venire de novo* awarded.

DERIVATION OF EQUITABLE PLAINTIFF'S TITLE FROM LEGAL PLAINTIFF need not be set out in the declaration. The doctrine of the principal case on this point is referred to with approval and variously applied in *Beale v. Commonwealth*, 7 Watts, 189; *McKinney v. Mehaffey*, 7 Watts & S. 278; *Commonwealth v. Lightner*, 9 Id. 118; *Pierce v. McKeehan*, 3 Pa. St. 141; *Irish v. Johnston*, 11 Id. 487; *Jones v. Martins*, 13 Id. 616; *Commonwealth v. Shuman's Adm'rs*, 18 Id. 346; *Lightner v. Commonwealth*, 31 Id. 344; *Mississippi etc. R. R. Co. v. Southern R. R. Association*, 8 Phila. 107.

DUNCAN v. KLINEFELTER.

[5 WATTS, 141.]

STATE LAW DOES NOT APPLY TO UNITED STATES COURTS.—A discharge by a state judge of a debtor imprisoned on process from a United States court, under the insolvent laws of the state, is invalid, because the state laws do not apply *proprio vigore* to the United States courts, and no such power is given to a state judge by the act conforming the proceedings of the United States courts to those of the state courts.

JAILER IS LIABLE TO THE SHERIFF FOR PERMITTING AN ESCAPE without the sheriff's knowledge or authority, for any damage occasioned to the sheriff thereby, even though the jailer acts in good faith and upon the advice of counsel.

DEBT OR CASE FOR AN ESCAPE, DAMAGES IN.—In debt for an escape of an execution debtor, the sheriff is liable for the whole debt and costs, but in case, the damages are in the discretion of the jury.

MEASURE OF DAMAGES IN ACTION AGAINST JAILER FOR ESCAPE.—The amount paid by a sheriff to compromise an action brought against him

for the escape of an execution debtor is not the measure of his damages against the jailer, who permitted the escape, but the damages must be left to a jury.

ERROR to the common pleas of York county, in an action on the case brought by the sheriff against his jailer for permitting an escape. By a special verdict it appeared that one Roth had been arrested by the United States marshal on a *capias ad satisfaciendum* issued from the United States circuit court for the eastern district of Pennsylvania, on a judgment recovered against him by certain citizens of Ohio, and had been committed to the custody of the defendant as jailer of York county by appointment of the plaintiff, who was sheriff of said county; that the said Roth, on application to one of the associate judges of the court of common pleas of said county, was discharged from imprisonment under the insolvent laws of the state, on giving bond to the plaintiff in execution, to appear and comply with the provisions of the said laws; that the defendant, in permitting him to go at large, acted in good faith, and after taking the advice of counsel; that afterwards the said Roth voluntarily returned into the defendant's custody, and was discharged under the act of congress of 1800 relating to insolvent debtors; that the plaintiff was subsequently sued by the plaintiffs in execution for an escape, and to compromise the suit, paid the plaintiffs one thousand and fifty dollars for said escape. The question as to the plaintiff's right to recover being submitted to the court upon these facts, the judgment below was for the defendant, and the plaintiff brought this writ of error.

Fisher and Lewis, for the plaintiff in error.

Evans and Chapin, for the defendant in error.

By Court, SERGEANT, J. The power of the associate judge of the court of common pleas of York county to discharge Roth from custody, under the *capias ad satisfaciendum*, issued by the circuit court of the United States, on giving bond to take the benefit of the act of assembly of the state of Pennsylvania, for the relief of insolvent debtors, is not sustainable. The act of assembly on this subject, passed the twenty-eighth of March, 1820, authorizes the debtor to apply to the president, or any associate judge of the court of common pleas of the county in which he was arrested, and to give bond, with such security as is required and approved by the said judge, conditioned to appear at the next court of common pleas for said county, to take

the benefit of the insolvent laws of this commonwealth, etc., on which the sheriff is to discharge him. But the provisions of the acts of assembly relate only to debtors held under executions issued from the state courts. It has never been supposed that they intended to give, or could give to the state courts or judges power to control the process of the courts of the United States in matters within the jurisdiction of the latter. In *Beers v. Haughton*, Sup. Ct. U. S., January term, 1835,¹ Mr. Justice Story, in delivering the opinion of the court, says, that state laws have no operation *proprio vigore* upon the process or proceedings of the courts of the United States, for the reasons so forcibly stated by Mr. Justice Johnson, in delivering the final opinion of the court in *Ogden v. Saunders*, 12 Wheat. 370,² and Mr. Chief Justice Marshall, in delivering the opinion of the court in *Wayman v. Southard*, 10 Id. 1, and by Mr. Justice Thompson, in delivering the like opinion in the *Bank of the United States v. Halstead*, Id. 51. But it is insisted that although the act of assembly may not, of itself, affect suits in the courts of the United States, yet by act of congress the state law has been adopted, and its provisions introduced into the judicial code of the United States. The act of congress which is relied on, is that of the nineteenth of May, 1828 (Pamph. L. 56), which, in section third, provides, that writs of execution and their final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same (except their style) in each state respectively, as are now used in the courts of each state, etc. And the argument of the defendant is, that the right of the debtor to give bond and be discharged was part of the proceedings upon the execution by virtue of the act of assembly of 1820, at the time this act of congress of 1828 was passed, and, therefore, the act of congress recognizes and adopts it. There can be no doubt, that although acts of assembly are not, in themselves, of any efficacy as to proceedings in the courts of the United States, yet if congress, by its enactments, adopts them, they become so far obligatory. But the defect of the argument of the defendant is, that the act of congress of 1828 nowhere gives authority to the judge of a state court to interfere with or control execution issued from the courts of the United States, or proceedings thereupon. If the state law can be applied in the way contended for, it must be by the tribunal in which the execution and proceedings are

1. 9 Pet. 329.

2. 12 Wheat. 212.

had, unless an express sanction be given by act of congress to the exercise of such jurisdiction by the state judges.

In the case of *Beers v. Haughton*, which has been strongly urged by the defendant's counsel, the application of the state laws to the case was made by the judge of the circuit court of the district of Ohio, who, under the authority given by the proviso in the third section of the act of congress of 1828, made a rule of court, that under neither mesne nor final process, should any individual be kept imprisoned, who, under the insolvent law of the state, had for such demand been released from imprisonment: and it was held by the supreme court of the United States, that this rule protected the bail of a defendant thus released, against a recovery on his recognizance in the same circuit court of the United States. It was upon the validity and effect of the rule of court that the case was decided. In the present instance, no such rule of court has been made by the circuit court of the United States in which the *capias ad satisfaciendum* against Roth issued, authorizing a discharge of a person who had given bond to one of the state judges to take the benefit of the insolvent laws of Pennsylvania. As, then, the exercise of such authority by the state judges is not recognized by the act of congress, nor conferred by any rule of the circuit court under the proviso, and it can not be derived from the act of assembly, it follows that none such existed, and that the discharge was unauthorized. It is fully settled, that an officer is not justified in obeying the order of a judge or court having no jurisdiction in the matter: 10 Co. 76 b; 8 Serg. & R. 424.¹ The only question that remains is, whether the jailer is liable over to the sheriff for the loss he has sustained by the escape which the former permitted. The jailer is the sheriff's deputy or servant, appointed to perform the duties appertaining to that office. The sheriff is liable for his acts, and he is responsible over to the sheriff for a non-performance of duty by which the sheriff is injured. The most important of the duties of the jailer, and one which he assumes to perform by the acceptance of the office, is to keep safely all prisoners lawfully committed to his custody, until discharged by due course of law. As the servant is liable to his master for breach of duty, in consequence of which a loss is sustained by the master, so if the jailer suffer a prisoner to escape, and the sheriff is thereby made responsible, the jailer is liable to him in an action on the case. The sheriff may, and often does take a bond of indemnity, with

1. Erroneously cited.

security, from the jailer to perform the various duties which by law are imposed upon him, and to save him harmless from the breach of them—but this is done for the security of the sheriff, and without such bond, the law makes the jailer liable upon the promise implied in his undertaking the office, for all that his duty requires him to perform: 1 Roll. Abr. 98; Cro. Eliz. 349; 8 Johns. 210.¹

The circumstances mentioned in the case stated, that the defendant took advice of the counsel, and acted with good faith, diligence, and fidelity, do not seem to be sufficient to exempt him from liability. A loss has been sustained, which must be borne by one of these parties: and it ought to be borne by him whose act or default has occasioned the loss, and not by him who had no connection with it. Where one undertakes an official duty, and fails in the performance of it, his ignorance or mistake of the law, or the honesty of his motives or conduct, does not exempt him from civil responsibility, where damage is sustained by his non-performance. The defendant's act was entirely his own; the sheriff was not consulted and had no participation in it, so far as appears.

On the question of the amount which the plaintiff is entitled to recover, a considerable difficulty arises from the manner in which the case stated is drawn up. The sum paid by the present plaintiff to the plaintiff in the execution was one thousand and fifty dollars, after suit had been brought in the circuit court for the escape. It is not stated whether that suit was debt or case; and a material difference between the two exists. In debt, for the escape of one held in execution, the jury, if they find for the plaintiff, must find the whole debt and costs: 3 Yeates, 17;² 4 Id. 47.³ But in case, they may find such damages as they think proper. The mere payment of the sum of one thousand and fifty dollars, would not, of itself, make that sum the measure of damages, because the compromise was made by the plaintiff without the consent or knowledge of the defendant that we know of. As a general position, the sum of one thousand and fifty dollars thus paid, is not the legal measure of damages; even if it be the true standard of what the plaintiff on the execution would have recovered against the sheriff. Circumstances might exist between the sheriff and the defendant, which would lessen or take away altogether the damages claimed of the defendant. At the same time it is proper to remark, that the circumstances mentioned

1. *Kain v. Ostrander*.2. *Shewell v. Fell*.3. *Shewell v. Fell*.

in this case are not of that character. In this uncertainty it is, perhaps, the safest course to refer the question of damages to the jury of inquiry, in whose power it will be to give to the plaintiff the whole money paid, with interest, or less, if there be legal ground to diminish the amount, and, in the mean while, judgment to be entered for the plaintiff generally.

Judgment reversed, and record remitted that judgment may be entered for the plaintiff generally, and a writ of inquiry of damages issued.

DAMAGES FOR AN ESCAPE.—In an action against a sheriff for an escape and false return on meane process, the plaintiff can recover no more than he could have done in the original action, and the recovery should be measured by the amount of the plaintiff's loss in consequence of the escape: *Potter v. Lansing*, 3 Am. Dec. 310.

STATE JUDGE CAN NOT DISCHARGE UNITED STATES PRISONER.—The action brought against Duncan, the plaintiff in the foregoing action, by the plaintiffs in the judgment against Roth, to recover damages for Roth's escape, was taken finally to the supreme court of the United States, and that court affirmed the decision of the court below, holding the discharge of Roth to be a nullity, and *Duncan v. Klinefeller* was several times mentioned approvingly in the course of the opinion: *Duncan v. Darst*, 1 How. (U. S.) 301.

JAILER'S DUTIES.—The remarks in the opinion in *Duncan v. Klinefeller* on this point, are quoted with approval in *Scarborough v. Thornton*, 9 Pa. St. 453.

FICHTHORN v. BOYER.

[5 WATTS, 159.]

PARTNER PRESENT AND ASSENTING TO THE EXECUTION OF A SEALED INSTRUMENT by his copartner in the firm name is bound thereby.

SUCH PRESENCE AND ASSENT MAY BE PROVED by any evidence satisfactory to the jury, such as the admissions of the party.

ERROR to the common pleas of Berks county. The opinion states the case.

Wharton and Alricks, for the plaintiff in error.

Smith and Johnston, for the defendant in error.

By Court, **SERGEANT, J.** This was an action of covenant brought by Benneville Keim, executor of Andrew Fichthorn, against Daniel Fichthorn and George Boyer, in which there had been an award of arbitrators against both the defendants, and Boyer appealed, and pleaded *non est factum*. Nine bonds had been given on the thirtieth of January, 1813, by George Kershner to George Shertle, conditioned for the payment of one hundred pounds respectively, at various dates. In 1820,

these bonds were assigned by Shertle to Fichthorn and Boyer. On the thirtieth of January, 1821, the following assignment of each of these bonds was executed:

"For a valuable consideration to us in hand paid by Andrew Fichthorn, jun., of the borough of Reading, Berks county, we do hereby assign and set over the within obligation, and all moneys due and becoming due thereon, etc., unto the said Andrew Fichthorn, jun., his heirs, executors, administrators, and assigns; and in case the same can not be recovered of the within-named George Kershner, then we do promise and agree to pay the amount thereof, together with all charges thereupon accruing, unto the said Andrew Fichthorn, jun., his executors, administrators, and assigns.

"Witness our hands and seals, this thirtieth day of January, 1821.

FICHTHORN AND BOYER. [L.S.]

"Witnesses present, William Stahle, William Fichthorn."

It appeared in evidence that there were two George Boyers, father and son, who entered into partnership with D. Fichthorn in the store-keeping business, in March, 1818, by written articles, to continue for one year; and parol evidence was given to show how long it continued, and who subsequently constituted the partnership. The names to the assignment of the thirtieth of January, 1821, were written, and the seal affixed by Daniel Fichthorn. The plaintiff alleged, that George Boyer, sen., although he did not actually execute this assignment, yet was the party really intended in the transaction, and was present at its execution and authorized it, and received the consideration, which the defendant denied; and it was in relation to this point that the evidence was offered, on the rejection of which, by the court, several bills of exceptions were taken. The plaintiff proved by William Stahle, one of the subscribing witnesses to the assignment, that it took place in the store of Fichthorn & Boyer; that G. Boyer, sen., the defendant, was off and on about the time the papers were handed over, or about the time they were signed: he did not know what Boyer was doing, nor what he said: he was in or at least coincided with it: he took it; Boyer coincided with it: he and A. Fichthorn had a conversation about it: he could not recollect what was said. On his cross-examination, he stated he had said on a former occasion that Boyer was not present at the time, but came in afterwards and sanctioned it: his meaning was, he was satisfied.

The plaintiff then offered in evidence an agreement signed by

Andrew Fichthorn, jun., dated the thirtieth of January, 1821; with the evidence of Mathias S. Richards, the subscribing witness, that G. Boyer was a party in receiving this agreement from A. Fichthorn, jun., and the evidence of H. Brobst, that G. Boyer received payment of the debt contemplated in this agreement. The substance of this paper was a declaration by A. Fichthorn, that in consideration of a valuable sum of money, to him secured to be paid, he thereby assigned to Daniel Fichthorn and George Boyer, the sum of eight hundred and twelve dollars and sixty cents, with interest due on a bond in his favor from G. M. Brobst and George Yerger, of Reading, on which a suit had been brought, and agreed, in case it should not be recovered, to pay the said sum to the said Fichthorn and Boyer, and appointed D. Fichthorn his attorney to prosecute the suit and receive the money. This evidence was objected to by the defendant, and rejected by the court. In this rejection the court was right, because the paper did not then appear to be connected with the assignment on which this suit is brought, and therefore, the defendants being a party to it, or receiving payment of the debt mentioned in it, did not tend in any way to support the issue. In a subsequent stage of the cause, after the introduction of other evidence by the plaintiff, this paper was received in evidence. The plaintiff then offered in evidence another paper, dated the fourth of January, 1822, and purporting to be an agreement between the parties to it, signed, Fichthorn & Boyer [L.s.], of the one part, and signed, Andrew Fichthorn [L.s.], of the other part, which had a more material bearing on the issue. This agreement recited, that for a valuable consideration, paid by A. Fichthorn, jun., to the said Fichthorn & Boyers, the said Fichthorn & Boyers did assign all their right and claim to several bonds becoming due and payable by George Kershner; and in the consideration money so paid by A. Fichthorn, jun., was included an obligation from George M. Brobst, for eight hundred dollars principal, calculated and taken in the account for said sum, as of April 15, 1821, and it was then agreed by the said parties, and thereby expressed, that in case the aforesaid sum, or any part thereof, should not be recovered by the said Fichthorn & Boyers from the said Brobst, or in his behalf, then the said A. Fichthorn, jun., should be liable for such sum as might be unpaid on said bond, and should return an equal amount in bonds, payable by the said George Kershner, assigned as aforesaid by the said Fichthorn & Boyers to A. Fichthorn, jun. On offering

this agreement, the plaintiffs proved by M. S. Richards, one of the subscribing witnesses to it, that Daniel Fichthorn signed it on the part of the firm; and that he had no doubt George Boyer was privy and present. The defendant objected to the evidence of the agreement, and the court rejected it.

It is to be observed that the question at issue between the parties was, whether George Boyer, the defendant, though he did not sign or seal the assignment of the thirtieth of January, 1821, was not the party intended in the transaction and present authorizing or assenting to it when D. Fichthorn signed the name of the firm and put the seal. For if he was, it is settled by the decisions of our own and other courts, that he is as much bound by it as if he had personally signed and sealed the instrument: *Hart v. Withers*, 1 Penn. 285 [21 Am. Dec. 382]; 3 Kent Com. Now the agreement of the fourth of January, 1822, goes to establish this fact; for it recites that the said Fichthorn & Boyers, parties to that agreement, were the persons who had executed the assignment of the bonds of Kershner: and Richard's evidence proves that the defendant was present and privy to this last agreement, and was, therefore, a party to it. The fact of one person being present assenting to the execution of a sealed instrument by another in his name, may be established by any of the usual modes of evidence. It is not essential that it be proved by a witness who saw him in the act. Whatever goes to satisfy the minds of a jury is evidence. The admission or acknowledgment, subsequently, is strong evidence. If so, the acknowledgment by the defendant Boyer in an instrument to which he was a party by being interested and present, and assenting to its execution, is admissible evidence to go to a jury. I will not say that the defendant is estopped by it. Estoppels are not to be relied on unless specially pleaded. But as an acknowledgment, deliberately made by the defendant, it ought to have been admitted. I am of opinion, therefore, that the court erred in rejecting this evidence. The plaintiff then again offered the paper first mentioned, of the thirtieth of January, 1821, and also M. S. Richards to contradict D. Fichthorn as to the purchase of the bond of Brobst.

Daniel Fichthorn had been examined as a witness by the defendant, without objection by the plaintiff, and stated that the defendant, Boyer, had no interest in the bonds; that no one was concerned with the witness in the purchase but his brother-in-law, G. Boyer, jun.; that the defendant was not

concerned in the sale or purchase of them. The plaintiff, for the purpose of contradicting him, offered to ask the witness whether the defendant went with him to D. Fichthorn to get the assignments drawn and gave directions about them, and pressed on the plaintiff to buy them. This evidence being objected to by the defendant, was overruled by the court. The evidence to be sure was slight, since, as has been suggested by the defendant's counsel, he might have gone to D. Fichthorn for this purpose without having any interest in the matter, and on behalf of others. But still as it went to show an activity on the part of the defendant in relation to the transactions on which this suit is brought, it was for the jury to judge in what capacity he went. If it went in any respect to show him interested, it was material as a part of the ground of his liability, and ought to have been received.

Judgment reversed, and a *venire facias de novo* awarded.

POWER OF PARTNER TO BIND COPARTNER BY SEAL.—The cases in the American Decisions on this point will be found by consulting the citations in the note to *Deckard v. Case*, ante, 287. A partner is bound by a sealed instrument executed in the firm name by his copartner, in his presence and with his assent: *Hart v. Withers*, 21 Am. Dec. 382. So, also, it is held that where a sealed contract is executed by a partner, in the firm name and for the benefit of the firm, and in the course of the partnership business, and his copartner has previously assented to the contract, or afterwards ratifies and adopts it, the latter is bound thereby: *Cady v. Shepherd*, 22 Id. 379. That the sealing of an instrument by one partner in the name of the firm, in the presence and with the assent of his copartners, is binding on them, is a point to which *Fichthorn v. Boyer* is cited in *Hunt v. Kline*, 2 Miles, 344. It is referred to also in support of the general principle, that one partner can not bind his copartners by a sealed instrument, unless executed in their presence, and by their direction, in *Overton v. Tozer*, 7 Watts, 333.

STERLING v. BRIGHTBILL.

[5 WATTS, 229.]

SEPARATE JUDGMENT CREDITOR OF A PARTNER IS NOT ENTITLED TO BE SUBSTITUTED to the rights of a judgment creditor of the partnership who has obtained satisfaction out of such partner's estate, to enable such separate creditor to proceed against the other partner, where there is nothing to show the latter partner indebted to his copartner whose property was taken to pay the firm debt.

ERROR to the common pleas of Dauphin county, to reverse a judgment substituting Brightbill, the defendant in error, to the rights of the Harrisburg bank, in order to obtain payment out

of the proceeds of the realty of one Elder. The plaintiff in error claimed the proceeds of said realty under Elder. The Harrisburg bank had obtained judgment against Elder and Ritchey, who were partners in trade, on a note made by Ritchey and indorsed by Elder for a partnership debt, and had procured a sale of Ritchey's realty on execution, and the appropriation of the proceeds to payment of the judgment. Certain realty which had been conveyed to Elder before the recovery of the bank judgment, had also been sold on execution on a judgment recovered previous to the conveyance against the grantor therein, and the balance of the proceeds of such sale after the payment of said judgment was now in court for distribution to those entitled to it. Brightbill had a lien upon a transcript of a guardianship account settled in the orphans' court on Ritchey's realty subsequent to the judgment of the Harrisburg bank, and now asked to be substituted to the bank's right as judgment creditor of the partnership so as to obtain payment out of the proceeds of Elder's realty. There was no evidence as to the respective interests of the partners in the firm, or as to the state of the partnership accounts. The judgment below was in Brightbill's favor.

McClure, for the plaintiff in error.

Alricks, for the defendant in error.

By Court, **KENNEDY, J.** If this were the ordinary case, where the first of two or more judgment or other lien creditors of the same person, having two funds from which he may satisfy his debt, and the others being posterior in point of time, having only one of the funds within their reach, the court might interfere, so as to give the junior creditors the benefit of the security of the first, upon their paying him the amount thereof, and permit them to use it against that fund, upon which they had no claim under their own securities, for the purpose of rendering all effective. But that is not this case; it is of a more complex character. The first judgment creditor here is the creditor of two persons, who stood upon the record as his joint debtors, both owning separate real estates at the time of the rendition of the judgment, which became bound by it; and the other creditors are, some of them, the separate creditors of one only of these two debtors, and the rest of the other. In the ordinary case first mentioned, there being but one and the same debtor, he, of course, stands in the same relative situation to each of his creditors; their claims are alike

just as against him, and it can make no difference to him how the funds are marshaled in their application to the payment of his debts. He can have no good reason to object to them, who are posterior in point of time, being subrogated to the rights of the first for the purpose of obtaining payment of their claims. But it is obvious, that where the second fund, which the first creditor has for the payment of his debt, is the estate of a second person, who is not the debtor of the one claiming to be subrogated to the rights of the first creditor, that this second person may have rights which would render it very unjust and inequitable to make the substitution. For instance, if he be only a surety, what could be more unjust? A surety, in this respect, has claim to great favor; and, instead of allowing the security to be used to his prejudice, courts, upon his paying the debt, will permit him to have and to use all the securities which the creditor held against his principal, for the purpose of reimbursing himself. He is entitled to a preference as regards the right of subrogation; and against him, I apprehend, no such right can be given or exercised in favor of any subsequent creditor of his principal.

The Harrisburg bank had the first lien here under this judgment against John Ritchey and John Elder jointly as partners; but for the debt coming to Jacob Brightbill, in right of his wife, who now claims to be subrogated to the rights of the bank, John Elder is in no respect liable. It is the proper debt of Ritchey alone; and without ascertaining whether Elder may not be a creditor of the estate of Ritchey to an equal or greater amount than the one half of the debt paid the bank by Ritchey's estate, it is manifest that great injustice might be done to Elder by making his estate liable to the payment of Ritchey's debt.

The principle of equity which the counsel of Brightbill here invokes, though well settled, "must be employed," as is said by Mr. Justice Sergeant, very correctly, in *Ziegler v. Long*, 2 Watts, 206, "like all other rules of equity, to the attainment of justice; it is not to be used to overthrow the equity of another person, and thus work injustice." Now, it must be observed, that neither Elder nor Ritchey's personal representatives are parties to or notified of this proceeding, though it may be said that Elder's assignee is; but to make the subrogation asked for, would not only affect the rights of the assignee, but those likewise of Elder himself. Neither was there any evidence adduced, showing what interest each had in the partnership, whether they were equal or not; or that there ever was a settlement be-

tween them of their partnership accounts, in which it was found that they were even, or that there was no balance due from Ritchey to Elder. There being no evidence to this effect, it seems to have been considered by the court below, that in the absence of all such evidence, it ought to be intended that their interests in the partnership were equal; and that, anterior to the payment of the bank debt out of the estate of Ritchey, there was no indebtedness of the one to the other, and that Elder, thereby, became debtor to the estate of Ritchey for one half of the debt so paid. It is possible that the court may have been led into this notion from what Chancellor Kent, in speaking on this subject, said in the case of *Sells v. The Administrators of Hubbell*, 2 Johns. Ch. 397. He there says: "The estate of each partner ought to be charged with the debt in equal portions, provided their interests in the partnership were equal. This is the intendment in the first instance; and it would be a thing almost of course for equity to allow the representatives of the deceased partner, who had to pay the whole debt, to be substituted in place of the creditor, in order to receive from the surviving partner, or his estate, a moiety of what they had paid. Nothing could stay this proceeding but the allegation of the surviving partner that he was the creditor partner, and that the estate of the second partner owed him a balance, as much or more than that it had been obliged to pay. This would render it requisite to take and state an account between the partners, before the court could interfere in any way to enforce the claim for contribution." But the chancellor does not go so far as to say, that, in the absence of evidence showing their respective interest in the partnership, they are to be presumed to be equal; but would rather seem to say that where this is made to appear, it shall be intended in the first instance that they ought to be charged with the debt in equal portions. This point, however, was not before the chancellor in such a way as to require a decision from him on it; and it, therefore, may be, that, if it had been necessary for him to have adjudicated upon it, he, upon applying his mind more closely to it, would have come to a different conclusion. For in a subsequent case of *Dorr v. Shaw*, 4 Id. 17, where a bill was filed by a subsequent judgment creditor of D. S. alone, against a prior judgment creditor of D. S. and P. S. jointly, to compel the defendant, who had sued out execution upon his judgment, and levied on the separate real estate of D. S., P. S. being the separate owner of real estate also bound by the judgment, which the

defendant subsequently to his judgment bought of P. S., either to cease all proceedings upon his judgment and execution, or to assign the same to the plaintiff, on being paid the debt, interest, and costs, Chancellor Kent dismissed the bill because it was not shown positively and distinctly that P. S. ought to pay the debt; yet I do not see why it might not have been said, at least with equal propriety, in this last case, in the absence of proof showing the contrary, that as the record of the judgment showed the debt to be owing by them as joint debtors, without making any distinction between them, it was to be intended in the first instance that it ought to be paid by them in equal portions. The chancellor, however, thought otherwise, and accordingly decided, that as the plaintiff claimed to be preferred upon principles of equity and benevolence, he ought to show clearly and positively that he was entitled to it upon grounds that left no room for raising objections against it, founded, as it would seem, even upon conjecture.

His language in illustration of the principle which governed his decision is very applicable to the present case. He says: "If both judgments had been against D. S. only, the rule that the prior creditor must be thrown first on the fund, not reached by the second judgment, might be applied. But here we have no means of knowing whether A. or B. ought to pay the debt; and it might be unjust, as between these two original debtors, if the court should interfere and charge the debt upon one of them instead of the other. They are not before us, and we have nothing in the cause to guide us in making a selection between them. The consequence is, that we can not interfere in the case." He then refers to the opinion of Lord Eldon in *Ex parte Kendal*, 17 Ves. 520, which he recites seemingly with entire approbation, who says: "We have gone this length: if A. has a right to go upon two funds, and B. upon one, of the same debtor, and the funds are the property of the same person, A. shall take payment from that fund, to which he can resort exclusively, so that both may be paid. But it was never said that if I have a demand against A. and B., a creditor of B. shall compel me to seek payment from A., if not founded in some equity giving B. for his own sake, as if he was a surety, etc., a right to compel me to seek payment of A. It must be established, that it is just and equitable that A. ought to pay in the first instance, or there is no equity to compel a man to go against A., who has resort to both funds." According to the principles laid down in these cases, which certainly commend

themselves strongly to every discerning mind for their adaptation to promote mutual justice, it ought to have been shown beyond doubt, that the estate of Ritchey had a right to go upon the estate of Elder for one half of the money paid out of it to the bank. But this could only have been shown by proving in the first place, that Elder and Ritchey were equal partners in their joint concern, "for the benefit of which the debt was created." And then, in the second place, that upon a final settlement of their partnership and other accounts, Elder was indebted to Ritchey or his estate: or that there was nothing due from the latter to the former when the estate of the latter paid the bank debt. No evidence, however, was offered as to either of these facts, but the affirmative would seem to have been presumed by the court in both instances. This, we think, was not sufficient to justify the court in coming to the conclusion, that Elder, from the state of the accounts as between him and Ritchey's estate, was bound to pay one half of the amount of the debt paid to the bank. That there ought to have been satisfactory and positive evidence adduced, establishing this latter fact beyond doubt, is deducible from legal analogy as well as from the nature of the thing itself.

From the principles already laid down, it is perfectly certain, that unless Ritchey's estate had the right to claim contribution from Elder, and presented itself in such a point of view as to show clearly that the right existed, Brightbill can have no claim as the creditor of Ritchey's estate; for it is only in right of Ritchey that he can pretend to claim contribution. But the money paid to the bank out of Ritchey's estate was paid in discharge of a partnership debt, owing by Ritchey and Elder as such to the bank, and without a previous settlement of the partnership account, showing that this bank debt ought to have been paid by Ritchey and Elder in equal portions; Ritchey, if he were living and had paid the debt, could not claim to have contribution allowed him in the manner it was here. His only remedy would be by an action of account render against Elder; in which all their partnership accounts would have to be brought into view, and to be stated and settled by auditors appointed for that purpose; by whom each of the parties might be compelled to answer interrogatories, upon oath or affirmation, in regard to matters of fact appertaining thereto; and unless it appeared upon such settlement, taking the money paid the bank into the account, that Elder was indebted to Ritchey, the latter could pretend to no right to contribution. Again, were Ritchey

living, it can not be questioned but a previous settlement of their partnership accounts made in some way, either amicably or otherwise, showing a balance struck in favor of Ritchey, and that Elder was his debtor, would be indispensably necessary, in order to establish that he was entitled to contribution. Even to enable him to maintain an action of assumpsit to recover it, this at least would be requisite. This is well settled by abundance of authority, which seems to prove pretty conclusively, that no intendment or presumption can or ought to be made in his favor, from the mere circumstance of the money's having been paid in discharge of a partnership debt, for the purpose of giving him a right to demand contribution.

This doctrine has been established with a view to protect the partner, against whom the claim is made for contribution, from paying, unless upon the principle of equalizing their profit and loss according to their respective interests in the partnership, it shall appear that he is bound to do so. This being the case as against Ritchey himself, were he alive, there is not even the shadow of reason why his representatives, or any one of his creditors, should be placed on a more favorable footing. We, therefore, think that Brightbill did not show himself entitled to claim any portion of the money arising from the sale of the land sold as the property of Elder, but that the residue of the money remaining after satisfying Hummel & Lebkicher's judgment against Daniel Ferguson, subject to the lien of which Elder became the owner of the land, must be appropriated towards paying the judgment of Sterling against Elder; and if any surplus should remain, then it is to be paid to Alexander M. Piper, who purchased the land of Elder; and to whom the latter assigned it subject to those claims, directed to be satisfied first out of the money arising from the sheriff's sale.

Judgment reversed.

WHERE ONE CREDITOR HAS RECOURSE TO TWO FUNDS, and another to only one of them, and the former obtains payment out of the only fund to which the latter can resort, see, as to the latter's right to be subrogated to the former's claim against the other fund, *Cheesebrough v. Millard*, 7 Am. Dec. 494; *Jones v. Zollicoffer*, 11 Id. 795 and note; *Ramsey's appeal*, 27 Id. 301. The principal case is recognized as an authority on this subject in *Kyner v. Kyner*, 7 Watta, 225; *Neff v. Miller*, 8 Pa. St. 350; and *Gearhart v. Jordan*, 11 Id. 332.

CASE v. GREEN.

[5 WATTS, 262.]

DELIVERY OF SPECIFIC ARTICLES AT THE TIME AND PLACE appointed by a contract for their delivery, where the payee does not attend to receive them, nevertheless satisfies the contract.

ERROR to the common pleas of Susquehanna county. The action below was on a written agreement to pay a certain indebtedness in scythe-snaths and rakes at a certain time and place, the property to be appraised by disinterested appraisers. The defendants proved that they delivered the articles at the time and place appointed, and that the plaintiff not being there to receive them, they had them appraised by disinterested appraisers, and left them at the place of delivery. There was evidence on the part of the plaintiff to show that he was sick at the time, and that the goods were left exposed to the weather and injured, and also that they were not worth the sum at which they were appraised. The jury were instructed, among other things, that if the property was delivered and appraised at the time and place according to the agreement, and the plaintiff did not attend to receive them, the contract was nevertheless discharged, and no action could be maintained thereon, though the defendants might be liable in trover or replevin, or as bailees for not taking proper care of the articles. Verdict and judgment for the defendants, and the plaintiff sued out this writ alleging error in the instructions.

Jessup, for the plaintiff in error.

Lusk, for the defendants in error.

By Court, **ROGERS, J.** The case supposes that the payor attended at the day and place fixed by the agreement, and delivered, or was ready to deliver, the property in satisfaction of the debt; so that the question is, what effect this has on the action. In general, a tender does not extinguish the demand. The only effect of it is to preclude any claim for interest; but still, in some cases, a tender by one party to pay a debt or perform a duty, and the refusal of the other to accept thereof, amounts to a payment of the debt or a performance of the duty. Thus, if A., without any debt or duty preceding, enfeoff B. of land, with condition for the payment of one hundred pounds to B., in the nature of a gratuity, and A. tender the money to B., and B. refuse to accept it, the land is thereof discharged forever. So, if a single bond be entered into for

the payment of twenty pounds to the obligee, and afterwards a deed be made, that, at the payment of ten pounds, the bonds shall be void, and the obligor tender the ten pounds, and the obligee refuse to accept it, the obligor is discharged forever. If a man enter into an obligation, in the penalty of one hundred pounds, with condition to perform an award, or to do some other thing, for the benefit of the obligee, which it was not incumbent on the obligor to do at the time of entering into the obligation, a tender by the obligor, of performing the award, or of doing the other thing, and a refusal by the obligee to accept thereof, are a perpetual bar to the action upon the obligation; for, as the condition is satisfied by the tender and refusal, the penalty can not be recovered; and, as the performing of the award or doing the other thing, which it was not incumbent on the obligor to do, at the time of entering into it, could not be parcel of the obligation, no action lies therefor, to compel the performance of the award or the doing of the other thing: 1 Inst. 207; 5 Bac. Abr. 11, tit. Tender. If a man be bound in two hundred quarters of wheat, for the delivery of one hundred quarters, if the obligor tender at the day one hundred quarters, he shall not plead *uncore prist*, because, albeit, as in these cases it be parcel of the condition, yet they be *bona peritura*, and it is a charge for the obligor to put them. The delivery of the goods is collateral to the obligation, as it is termed, and by tender and refusal, the plaintiff shall never be entitled to the money. In the Institutes, it is said, if the obligee refuse them, when a lawful tender is made to him, it shall be accounted his own folly. And in all such cases, in pleading of the tender and refusal, the parties shall not be driven to plead, that he is ready to pay the same, or tender it in court.

So, also, in *Slingerland v. Morse*, 8 Johns. 475, where the contract was to deliver horses and household property, which was tendered and refused, it was decided, that such a tender and refusal was a complete bar to the suit, on the contract; and that the plaintiff must resort to the person in whose possession the goods are, and who held them as bailee and at his risk. The only difference between the case cited and the case at bar is, that here, there was not a tender and refusal, because the payor did not attend at the time and place appointed. But this can make no difference in principle; for every consequence which would have followed from a tender and refusal, will follow from being ready to tender, in case the person,

whose duty it was to be present at the place where the tender was intended to have been made, neglect to be present. If every such consequence did not follow, it would frequently happen, that notwithstanding one party has done all that was in his power to make a tender, all would be rendered ineffectual, by the willful absence of the other party: 5 Bac. Abr. 14, tit. Tender. The effect of the tender and refusal, or being ready to tender, when the other party does not attend, is to divest the property from the original owner, and invest it in the payee. Of course, all right of action is extinguished, on the contract; it having been satisfied and paid. If, therefore, the plaintiff has any remedy, it must be by suit against the party in whose possession the goods are, and not upon the contract. It must be remarked, that the articles were not of such a nature as to be liable to injury by an exposure to the weather for a few days. Judgment affirmed.

TENDER TO SATISFY CONTRACT TO PAY IN SPECIFIC ARTICLES: See on this point *Lamb v. Lathrop*, 27 Am. Dec. 174, in the note to which the other cases and notes in this series on the same subject are collected. Where the promisor in a contract to pay in specific articles at a certain time and place, brings the articles to the place and at the time appointed, and delivers them, or sets them apart for the promisee, whether he is present to receive them or not, the property passes, and the contract is discharged: *Zinn v. Rowley*, 4 Pa. St. 171; *Dailey v. Green*, 15 Id. 125, both citing *Case v. Green*.

WEISER v. WEISER.

[6 WATTS, 279.]

THERE IS NO IMPLIED WARRANTY IN A PARTITION DEED between tenants in common under a will, though there is, it seems, an implied special warranty annexed to every partition between coparceners.

EXPRESS SPECIAL WARRANTY LIMITS AN IMPLIED GENERAL WARRANTY in a deed, except, perhaps, where the implied warranty is a necessary consequence of tenure, which is not the case in a partition deed.

ERROR to the common pleas of Union county, in an action of covenant upon a partition deed executed by the children and devisees of Conrad Weiser, deceased, allotting among themselves certain land devised to them as tenants in common. The plaintiff was the administrator of Peter Weiser, to whom a part of said land had been devised by Frederick Weiser, one of the parties to said deed, to whom said part had been allotted in the partition. Peter Weiser had been evicted by title paramount. The defendants were administrators of another one of the par-

ties to said deed. The plaintiff relied upon an alleged implied warranty of title in the deed, which was set out in the declaration as a general warranty. The deed was offered in evidence. It contained an express covenant of special warranty. The court rejected it as not supporting the declaration. Verdict and judgment for the defendants, and the plaintiff brought error.

Greenough, for the plaintiff in error.

Bellas, contra.

By Court, **KENNEDY, J.** The only question presented here is, whether the deed offered in evidence by the plaintiff, contains such a covenant as that set forth in this declaration; for a breach of which he claims to recover damages. It is admitted that the deed contains no express covenant of the same effect; but it is contended, inasmuch as it is a deed of partition, that a general warranty, such as the plaintiff has declared on, arises from the very nature of the transaction, by implication of law, without any such being expressed. It is true, that as between coparceners every partition has annexed to it, not only a warranty, but a condition in law; by virtue of the latter a coparcener, in case of her eviction from any portion of her allotment, however small or insignificant, may re-enter upon the other coparceners or their heirs and defeat or annul the whole partition; or she may by force of the former vouch them, in which case she shall only obtain a recompense for the part lost: Co. Lit. 173 b, 174 a, 384 a; *Bustard's case*, 4 Co. 121; 4 Cru. Dig., tit. 32, Deed, c. 24, sec. 24. But here the partition was made between tenants in common, as appears from the plaintiff's showing in his declaration, and the implied warranty, which arises in the case of partition, is confined to a partition made between coparceners, and the law does not create it in any other case of partition: 4 Cru. Dig., tit. 32, Deed, c. 6, sec. 17. This distinction arose, no doubt, from the right of compulsory partition being, in the case of coparceners, the gift of the common law: Litt., sec. 247; but in the case of joint tenants and tenants in common, it was first given by the statutes 31 Hen. VIII., c. 1, and 32 Id., c. 32; Litt., secs. 290, 318; Co. Lit. 169 a, 187 a.

The common law having established this right in favor of coparceners, because their relationship being created by it, and not by an act or choice of their own, as in the case of joint tenants and tenants in common, thought it reasonable that it

should endure no longer than the parties should be pleased with it; but at the same time deemed it expedient, as well as just, that they should not be placed in a worse condition by the partition, than if they had continued to enjoy their respective interests in the lands or property without a division; because, if the partition had not been made, and there had existed an outstanding title paramount for a portion of the property, to recover which a suit had been commenced, they must have been impleaded jointly, and the loss sustained, by a recovery, would consequently have fallen equally upon all; therefore, after the partition, a warranty was annexed by the common law to each part, so that if any one should be so impleaded, she might vouch her sisters, or those who had been her coparceners, at the time of partition, or their heirs, and by this means also have their aid to deraign the warranty paramount, if any existed, annexed to the purchase of their ancestor: Co. Lit. 173 b, 174 a; *Bustard's case*, 4 Co. 121. For, although by the statute of 31 Henry VIII., c. 1, sec. 2, the writ *de partitione facienda* is given to joint tenants and tenants in common; and they are thereby rendered liable to make partition, according to the words of the statute, "in like manner and form as coparceners by the common laws of this realm have been and are compelled to do," yet the statute does not enact nor declare that any warranty shall be annexed, so as to enable any one or more of them thereafter, in case of being impleaded for his or their allotments or any portion thereof, to vouch the rest; but merely provides by the third section, "that every of the said joint tenants and tenants in common, and their heirs, after such partition made, shall and may have aid of the other or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate as is used between coparceners after partition made by the order of the common law."

It was thought nothing but just, seeing they were thus compelled to make partition, to secure to them the benefit of such warranty paramount, after the partition should be made, the same as they were before entitled to it; and an express provision to this effect was deemed the more especially necessary in order to preserve it, for anterior thereto, when partition was made by consent or agreement, which was the only mode whereby it could be effected, they, by making partition, destroyed that warranty: Co. Lit. 187 a, 169 a. And this circumstance of its destroying such warranty may, in some cases,

have proved an obstacle to thus making a partition, when they had any doubt as to the goodness of their titles; and perhaps ought still to make them cautious, under like doubts, in making partition merely by agreement, without writ; or otherwise than in pursuance of the statute; for it would seem that unless it be so made, all the common law incidents will attend it: Id. 187 a. Joint tenants of the freehold or inheritance before the passage of this statute, were not only restrained to making partition by agreement, but it was necessary to have it consummated by the execution of a deed in order to render it effectual: Id. 169 a, 187 a. But tenants in common, being seised of several estates or interests, might have done it by parol, provided it were executed by livery to each one of his separate allotment: Id. 169 a. But the statute of frauds makes a writing necessary now in all cases of partition made by agreement without writ. Seeing, then, that joint tenants and tenants in common, before the statute of 31 Hen. VIII., could only make partition by agreement, there was no good reason why the law should imply or annex a warranty in such case, because the parties, in making the partition, were perfectly competent, and had full power to provide by the terms of their agreement against future losses by titles paramount or prior incumbrances; and accordingly it became customary to introduce into the deeds of partition mutual covenants in respect to the title, which practice continues to prevail even at the present time: 4 Cru. Dig., tit. 32, Deed, c. 6, sec. 17.

But if it were so, that the statute did annex a warranty to a partition made between joint tenants or tenants in common, such as exists in the case of coparceners, it would not raise it here, because the partition was not made under the statute; and it only extends its operation to partitions made in pursuance thereof. And accordingly Lord Coke lays it down, Co. Lit. 169 a: "They must pursue that act by writ *de partitione facienda*; and a partition between joint tenants, without writ, remains at the common law, etc. And so it is, and for the same reason, of tenants in common." And in Id. 187, a, he again repeats: "But since Littleton wrote, joint tenants and tenants in common are generally compelled to make partition by writ framed upon the statutes of 31 and 32 Henry VIII.: and albeit they be now compellable to make partition, yet seeing they are compellable by writ, they must pursue the statutes, and can not make partition by parol, for that remains at the common law." And so in the same folio he says: "If two

joint tenants be of land with warranty, and they make partition by writing, the warranty is destroyed; but if they make partition by writ of partition upon the statute, the warranty remains, because they are compellable thereto." And it may be added, also, because under such compulsory partition, the benefit of a paramount warranty is expressly preserved, as already mentioned, by the third section of the statute of 31 Hen. VIII., c. 1.

We have stated above, that, as the law annexed no warranty in cases of partition made between joint tenants and tenants in common, the parties supplied this by the insertion of mutual covenants, clearly and distinctly expressed in the deed, so far as they were willing to become bound to each other, for the goodness of the title and the future enjoyment of their respective allotments, and that such has been the practice from the earliest period down to the present time. And the deed in question is evidence of its having been done by the parties to the partition therein set forth: but then the covenant, inserted in it, is only a special covenant of warranty; one of much narrower import than that declared on, which is one of general warranty, and, therefore, not the same with that expressed in the deed.

Seeing, then, that the deed contains no such covenant, either express or implied, as that set forth by the plaintiff in his declaration, it is perfectly clear that the deed did not contain anything which tended to support the plaintiff's allegation, and was, therefore, rightly rejected by the court. But even supposing this to have been the case of a deed of partition made between coparceners, still I apprehend that the implied warranty would not have enabled the plaintiff to recover: for it is only a special, and not a general warranty that is implied in such case; and which, at most, only entitles the party, upon voucher, to recover, not other land of equal value, but so much of the remaining land alone in value, which was the subject of partition, as shall be sufficient to equalize the loss that may be occasioned by the eviction: *Bustard's case*, 4 Co. 121; *Eaton College v. The Bishop of Winchester*, 3 Wils. 491; Perk., sec. 310. It is one of those warranties to which Lord Coke has allusion in Co. Lit. 384 b, when he says "that in some cases warranties in law do extend to execution in value of special lands, and not generally of lands descended in fee simple;" so that the party claiming redress under the warranty annexed by law to partition, would seem to be restricted to the lands which

were the subject of the partition, as long as any part thereof remained, but after they were all gone, he would be without remedy upon such warranty.

But besides this, the implied warranty in partition between coparceners was only in privity; for none shall vouch by force of it, except the parties to the partition, or their heirs, and no assignee: *Bustard's case*, 4 Co. 121; Litt., sec. 262. And Lord Coke says: "When the whole privity between coparceners is destroyed, there ceases any recompense to be expected, either upon the condition in law, or warranty in law by force of the partition:" 1 Inst. 174 a. And hence, if a man die seised of two parcels of land of equal value, one held by him in fee simple and the other in fee tail, leaving issue two daughters, who make partition thereof between them, allotting the land in fee tail to the elder daughter and the land in fee simple to the younger, who aliens her land in fee and dies leaving a daughter, such issue, as one of the heirs in tail, may enter into the land in tail and possess it with her aunt, but the aunt shall not enter into half the land in fee simple, in the occupation of the alienee, for by the alienation, the privity is destroyed: Litt., sec. 260; 1 Inst. 172 b. Now, the plaintiff here is the personal representative of Peter Weiser, who was evicted of the land by a title paramount, and who, according to the plaintiff's statement, as set forth in his declaration, was the devisee, that is, assignee, and not heir of Frederick Weiser, one of the parties to the deed of partition; so that the plaintiff is not the representative of a party to the partition, nor yet of the heir of a party, but merely the personal representative of the assignee of one, and, therefore, agreeably to the rule mentioned above, the plaintiff's intestate could not have vouched, when living, by force of the implied warranty, and of course can have no claim to any recompense from the defendant.

But, in the next place, admitting that a personal action of covenant may be maintained, which, I think, is somewhat doubtful, at least, upon a breach of the implied warranty that arises in the case of a partition made between coparceners, there is still another objection, which, as it appears to me, would be fatal to the plaintiff's recovery upon it, even if it were to be considered a general warranty, which it certainly is not. The parties to the deed of partition have thought proper to insert in it an express covenant of special warranty, limiting the responsibility of each for the goodness of the title to the

lands divided, to the acts done or suffered by him or her, which might happen to affect it, and against such persons only as should lawfully claim by, from, or under him or her, etc. Now, according to the fourth resolution in *Noke's case*, 4 Co. 80, it was held by Chief Justice Popham, and the whole court, as Lord Coke says, that an express covenant qualified the generality of an implied covenant, and restrained it by the mutual consent of the parties, so that it should not extend any further than the express covenant. *Expressum facit cessare tacitum*. And although in *Proctor v. Johnson*, 2 Brownl. 214, the chief justice seems to doubt the authority of this resolution, and says that this point in *Noke's case* was not adjudged, but was a matter spoken of collaterally in the case, and the case was adjudged against the plaintiff for other reasons; and again, in Croke's report of the case, Cro. Eliz. 675,¹ he says, that Chief Justice Popham inclined to this opinion, but the other justices did not deliver any opinion therein, yet Lord Hale, in *Deering v. Farrington*, 1 Mod. 113, lays down the law according to this resolution, and the authority of *Noke's case* upon this point has been since recognized in many cases, and is now considered an established rule of law: *Hayes v. Bickerstaff*, Vaugh. 126; *Brown v. Brown*, 1 Lev. 57; *Frontin v. Small*, 2 L. Raym. 1419; *Clarke v. Jamson*, 1 Ves. 101;² *Merril v. Frame*, 4 Taunt. 329; *Shep. Touch.* 165; 4 Cru. Dig., tit. 32, Deed, c. 24, sec. 22, and c. 25, secs. 16, 17; *Christine v. Whitehill*, 16 Serg. & R. 114; *Frost v. Raymond*, 2 Cai. 192 [2 Am. Dec. 228]; *Kent v. Welch*, 7 Johns. 258 [5 Am. Dec. 266]; *Vanderkarr v. Vanderkarr*, 11 Id. 122; *Gates v. Caldwell*, 7 Mass. 68; *Sumner v. Williams*, 8 Id. 162 [5 Am. Dec. 83.]

But it has been said that this rule is not applicable to leases, or conveyances of freehold estates, or those of inheritance; and this distinction would seem to receive some countenance from what is said in 1 *Shep. Touch.* 165; where, after laying down the rule as established in *Noke's case*, which had reference to a term for years merely, the author says: "This is not like to the case where a man doth make a lease for life by the words '*dedi et concessi*,' or make a lease for life by other words reserving rent (in which cases the law doth create a warranty against all men during the life of the lessor): for if in these cases there be an express warranty in the deed, yet this doth not take away, nor qualify, the implied warranty: but the lessee may make use of which of these he will, if he be ousted or

1. Cro. Eliz. 809.

2. *Clarke v. Samson*.

evicted by "one that hath elder title." And Mr. Butler in his note (1) to Co. Lit. 384 a, on this subject, in reference to granting estates of inheritance in lands, says: "When they (lands) were granted to be held of the grantor himself, at least if the grant were made by the word '*dedi*,' then without any other warranty, the feoffor and his heirs were bound to warranty. This is enacted by the statute *de bigamis*, c. 6, and we have Lord Coke's authority that this statute was only declaratory of the common law in this respect. The reason for implying warranty in this case, is, by his lordship, said to be that "where *dedi* is accompanied with a *per durable* tenure of the feoffor and his heirs, there *dedi* importeth a *per durable* warranty for the feoffor and his heirs to the feoffee and his heirs: 2 Inst. 275. The warranty in this instance was, therefore, a consequence of tenure: Co. Lit. 101 b, and so necessary a consequence of it, that where an express and qualified warranty was introduced, it did not restrain or circumscribe the implied warranty." But in England, as Mr. Butler observes in the same note: "The statute *quia emptores terrarum*, put an end to this implied warranty, as incident to granting of lands in fee simple, and excepting in cases of homage ancestral, no warranty, unless it arose from the express contract of the parties, bound more than the donor, or bound him longer than the term of his life. But then this statute does not extend to grants for life or in tail made by the owner of the fee simple, who still retains the reversion, for there the grantee holds of him and tenure of course exists. But according to the statute *de bigamis*, which seems to be only a confirmation of the common law, as laid down by Bracton, though the deed does contain the words *dedi et concessi tale tenementum*, yet if the land is given to be holden of the chief lords of the fee, or of any other, and not of the feoffor, or his heirs, reserving no service, without homage or without the above-mentioned clause, it was declared that the heirs should not be bound to warranty, notwithstanding the feoffor, during his life, should be bound by force of his own gift: 2 Inst. 274, 275; 2 Reeve Hist. Eng. Law, 144; 1 Id. 445. The words of Bracton in relation to this subject, are "*sciendum est quod ad omnes chartas de simplici donatione, competit tenenti warrantizatio et tenentur donatores et eorum hæredes ad warrantiam, etc., nisi forte in charta de feoffamento contrarium exprimitur*:" Lib. 5, fol. 388, 389. And are rendered by Mr. Reeve thus: "In all charters *de simplici donatione*, the tenant was entitled to a warranty from the

donor and his heirs, unless some clause was inserted, specially declaring that the donor, or his heirs, should not be bound to warranty, or to make an *excambium*: 1 Reeve Hist. Eng. Law, 445. Let the law, however, be as it may, in regard to the practicability of restraining or circumscribing an implied warranty, which is the necessary consequence of tenure, and, therefore, to be considered as ever incident to it, it is in no wise applicable to the case of coparceners, after partition made between them, more than before, for they do not hold of each other. They are still in, by descent, from the common ancestor: See 1 Inst. 173 a, where Lord Coke says: "The partition is in truth less than a grant; for it maketh no degree, but each coparcener is in, by descent, from the common ancestor."

The parties, therefore, to a partition, whether they be coparceners, joint tenants, or tenants in common, are at full liberty to regulate and limit the extent of their future liability to each other, in regard to it, as they please, by the introduction of express clauses or covenants for that purpose, into the deed of partition, *conventio et modus vincunt legem*. This may be advisable, too, for the greater security, even in cases where the law will create a warranty; for Lord Coke says: "There is a diversity between a warranty that is a covenant real, which bindeth the party to yield lands or tenements in recompense, and a covenant annexed to the land, which is to yield but damages; for that a covenant is in many cases extended further than the warranty. As, for example, it hath been adjudged, that where two coparceners made partition of land, and the one made a covenant with the other to acquit her and her heirs of a suit that issued out of the land, the covenantee aliened. In that case the assignee shall have an action of covenant, and yet he was a stranger to the covenant, because the acquittal did run with the land."

Judgment affirmed.

IMPLIED WARRANTY ANNEXED TO AN INVOLUNTARY PARTITION OF LANDS: See *Feather v. Strohoecker*, 24 Am. Dec. 342. There is an implied warranty of title in a partition of lands between tenants in common who derive their estate by descent: *Patterson v. Lonning*, 10 Watts, 135, distinguishing the principal case.

LEISENRING v. BLACK.

[5 WATTS, 303.]

ATTORNEY PURCHASING FOR ONE OF TWO EXECUTION PLAINTIFFS.—Where an attorney for two plaintiffs in an execution purchases land sold under the execution at a price less than the amount of the claim, for the benefit of one of the plaintiffs, and takes the deed in his name, without the consent of the other plaintiff, the purchase will be deemed to have been made in trust for both plaintiffs.

ERROR to the common pleas of Northumberland county, in an action of ejectment brought by the plaintiff as personal representative of William C. Black, deceased, against Jane Black. The premises in question were formerly the property of James Black and were sold at execution sale on a judgment in favor of William C. Black and Jane Black. Parker, the attorney who was employed by the plaintiffs to collect the amount of the judgment, purchased the premises at the sale at a price far below the amount of the execution, and had the property returned as sold to Jane Black, one of the plaintiffs in execution, and subsequently procured sheriff's deeds to be executed in her name, he giving a receipt therefor to the sheriff and agreeing that the amount bid should be settled with the judgment creditors. There was no evidence that Jane Black ever paid any money for the property, or had ever settled with William C. Black for his proportion of the price or of the money made on the execution, or that the said William ever consented to the sale and deed being made to Jane Black, or that he had ever claimed or disclaimed any interest in the purchase. The property in question was all that James Black owned. The jury were instructed that upon these facts the plaintiff could not recover, and returned a verdict for the defendant. Judgment on the verdict, which this writ was brought to reverse.

Donnel, for the plaintiff in error.

Greenough, for the defendant in error.

By Court, **KENNEDY, J.** If the attorney had directed the lots on his bids to have been returned by the sheriff as sold to himself, and the sheriff had accordingly done so, and had made and delivered the deeds of conveyance therefor to him, upon his undertaking to settle the amount of the purchase money with his clients, it could scarcely admit of a question, that the plaintiffs in the judgment would have had a right to have claimed that his purchase was made in trust for them. The

attorney in such case being employed by his clients to collect the amount of the judgment, and to do the best he can for them in this respect, it is altogether incompatible with those motives of action which ought to govern him, and which alone are suited to secure a faithful discharge of the trust, to permit him to become the purchaser of the property for his own benefit, unless it be for a sum sufficient to cover the whole amount of his client's demand. To permit him to buy for his own use for a less sum, without the consent of his clients, would be enabling him to make a gain or profit by sacrificing their interests: because the lower the price for which he should purchase the property, the greater his advantage in doing so; such a principle, therefore, is not to be tolerated. And indeed no rule seems to be better settled, than that whenever confidence is reposed in a person, who, from his being placed in such situation, has it in his power to gain an advantage without the certainty of discovery, by sacrificing the interests of those he is bound to protect, he shall not be suffered to enjoy it, except by their consent, and not even then, unless they be competent to part with their right to protection in this respect. Neither is this rule to be understood as applicable only where it is shown that some advantage has been actually gained by the party acting in the character of an agent or trustee, by making a purchase in his own name, in order to give those alone whose interest he was bound to consult and promote, the benefit of the purchase. It would in many cases be of little avail, if it were so; it arises from the nature of the relation between the parties, and is alike applicable, however honest and fair the purchase may be; and it is not necessary to inquire whether the purchase is an advantageous one or not: because, the fact may be so, and yet not susceptible of being distinctly and clearly proved at the time; or there may even be fraud in it, and the party against whom it has been committed, not able to prove it.

The rule therefore is founded in principles of public policy; and with a view to protect the interests of those for whom the party has undertaken to act, all temptation to do anything in opposition thereto is removed, by giving them the right of claiming the benefit of the purchase. And there is, perhaps, no relation, in which the confidence is greater between the parties than that of attorney and client, and where the influence over the mind and interests of the client is greater than that possessed by his attorney. The most implicit confidence

is reposed in the integrity, skill, and discretion of the latter, and that all these will be exerted to the utmost of his ability, so far as may be necessary, to accomplish the end for which he is retained. And although the sheriff is the agent of the law in making sales of property taken in execution, and in doing so, may very properly be considered as acting under the authority thereof, yet the attorney of the party at whose suit the property is about to be sold, has a control in regard to it, that may in many instances be exercised either to the advantage or prejudice of his clients as he pleases. It may be advisable, for instance, on the part of the attorney, after the property has been advertised for sale, or after it has been exposed to sale, for some good reason, to postpone or countermand the sale, in order to obtain a better price and make the amount of his client's claim, by offering it for sale at a future time; or he seeing, at the time first appointed for the sale, that the property was likely to be sold for a price greatly below its real value, and the amount of his client's debt, might, instead of countermanding it, urge the sheriff to go on and make the sale, and he become the buyer himself for his own use; but if his clients have the right to claim the benefit of such purchase, the attorney will not be likely to permit the sheriff to sell under circumstances that might prove injurious to their interests. If the attorney then can not become a purchaser of the property for his own use at a price or prices insufficient to pay the amount of his client's judgment, because inconsistent with those principles and motives upon which he is required to act in order to insure a faithful discharge of his duty towards his clients, is it not equally apparent that where he has undertaken to act as the attorney of two in a matter where they are jointly concerned, as in this case, and to do the best he can for the common benefit of both, that he can not, consistently with the duty he owes to them, become the agent of one exclusively without the knowledge or consent of the other, and purchase the property for him at the sheriff's sale, upon the most favorable terms or lowest prices that it can be had?

To permit the attorney to serve and promote the wishes of the one in this respect, may very readily tend to prejudice the interest of the other, and therefore ought not to be sanctioned. In short, he ought not to assume any agency for one that might tend to excite a feeling on his part, which would conflict in the slightest degree with the faithful discharge of the duty which he owes to the other. But his undertaking

to buy the property for one, may incline him to wish to get it at reduced prices, while his paramount duty to the other, requires that he should do all he can to make it bring its full value, in order to satisfy the judgment. It would therefore seem to be just and equitable, as well as agreeable to the dictates of sound policy, that the other plaintiff should have the right at his option to claim a joint and equal interest in the purchase. Let us suppose that one, of two plaintiffs in a judgment, should undertake by agreement with his partner, of which agreement his action and interference in the matter might be sufficient evidence, without any direct proof of it, to collect the amount, would it be considered consistent with a faithful discharge of such agreement, for him, having a control over the sheriff, so far at least as to countermand the sale at one time and to renew the order for it at another, when all the property of their debtor was levied on and about to be sold under this judgment, to buy it at reduced prices, leaving more than one half the amount of their judgment still unsatisfied, and having by a resale afterwards made the whole amount of the judgment out of the property, to refuse to account to his partner for more than one half the aggregate bidden by him at the sheriff's sale, under the plea that he had bought exclusively for his own use? It appears to me that it would not be in good keeping with his agreement, and that it would be a direct violation of the doctrine and rule stated above, which prevails in and regulates all cases of trust or confidence. In such case the acting plaintiff must be considered as acting for the benefit of both, and when the property is purchased for the purpose of securing the debt, or as much of it as possible, it is nothing but just and equitable that it should be held and taken to have been bought in trust for the use of both. Under this view we think that the purchase of the lots in question must be deemed to have been made in trust for both the plaintiffs in the judgment, there appearing to have been no consent either express or implied on the part of William C. Black, that it should be made exclusively for the defendant here. Besides, it would rather seem that the lots were bought with the joint funds of the two, which would of itself alone be sufficient to create a resulting trust in favor of William C. Black.

This is a fair inference, because it does not appear that the defendant ever accounted to him in any way for his half of the purchase money or prices bidden for the property at the sheriff's sales. If, however, the fact be, that William C. Black

and the defendant were partners in trade, and the judgment against James Black was for a partnership debt, and upon settlement of the partnership accounts, the whole amount of this debt should be found to be absorbed in payment of or wanting to pay partnership debts, then the interest of William C. Black in the property may amount to nothing; for if he were living, he could only claim for his exclusive use one half, or whatever his proportion, according to the terms of the partnership agreement, might be, of the surplus of the partnership stock or property, remaining after the payment of all debts and claims existing against it. The defendant being the surviving partner, has, therefore, a claim or lien on the property for the purpose of paying such debts and claims, if not already satisfied, and of the partnership funds; and the separate creditors of William C. Black could therefore only levy on and sell such separate and exclusive right as should remain after payment of the partnership claims; whatever that may be, the purchaser at sheriff's sale will ultimately be entitled to hold it. And in the mean time he is entitled to recover the possession of an undivided moiety of the lots, and to hold it until it shall be made to appear, as has been suggested, by a settlement with the personal representatives of William C. Black, that it will be required for the payment of the partnership debts, or the reimbursement of the defendant, if she shall have paid to that amount of her separate funds. We therefore think that the court below erred in advising the jury as they did, that from the evidence the plaintiff was not entitled to recover, and that their verdict ought to be in favor of the defendant.

Judgment reversed and a *venire de novo* awarded.

PURCHASE BY PLAINTIFF'S ATTORNEY AT EXECUTION SALE.—An attorney, under his general authority as such, can not purchase land sold under an execution in his client's favor, in trust or for the benefit of such client: *Beardsley v. Root*, 6 Am. Dec. 386. Whether the purchase is valid or not, it is held, in *Blight's Heirs v. Tobin*, 18 Id. 219, that such a purchase is a circumstance which will induce the court to look into the sale with greater strictness. The doctrine laid down, *arguendo*, with such cogency of reasoning, in the foregoing opinion, that a trustee or other person acting in a fiduciary capacity with respect to a sale of property, can not become a purchaser for his own benefit, but that such purchase will be deemed to be made in trust for the beneficiary, is one for which the case is cited as an authority in *Bartholomew v. Leech*, 7 Watts, 474; *Fisk v. Sarber*, 6 Watts & S. 21, 41; *Beeson v. Beeson*, 9 Pa. St. 284; *Beck v. Uhrich*, 16 Id. 503.

SCHRIBER v. RAPP.

[5 WATTS, 251.]

RELIGIOUS ASSOCIATION FORMED ON THE BASIS of a community of property, each member surrendering to the association the property that he owns, to be enjoyed in common by all, and agreeing to promote its interest by his labor and otherwise, in consideration that he is to receive religious instruction, etc., as well as support for himself and family, and that in case of his withdrawal from the association, the value of his property is to be refunded to him, is not forbidden by law.

PRIVILEGE OF WITHDRAWAL SECURED to the members of such an association, can not be exercised after the death of a member by his personal representative so as to enable him to claim compensation for services rendered to the society by the decedent.

REPRESENTATIONS ADDRESSED TO THE SUPERSTITIOUS FEARS of a party to induce him to enter into a contract, to the effect that if he does so, his name will be "written in the Lamb's book of life;" and that if he does not, he will "go to hell," if conscientiously and sincerely made, do not furnish ground for setting aside the contract, but direct imposition must be shown.

ERROR to the common pleas of Beaver county, in an action of account render brought by the plaintiff as administrator of Peter Schriber, deceased, against George Rapp and others, alleged to be doing business in company under the name of the Harmony Society. It appeared in proof that the society in question was a religious association of which the deceased became a member at the age of forty, in 1806, and that he continued a member until his death in 1833; that he brought into the association property and money to the value of some eight thousand dollars; that in 1826 he conveyed to Rapp and his associates, "known by the name and style of the Harmony society," all the property which he had when he became a member in consideration of the sum of five dollars and his future support during his natural life, and released, quitclaimed, and discharged to the said Rapp and his associates and successors, all causes of action, suits, debts, dues, etc., which he or his representatives had or might have against them. It further appeared that articles of association had been executed by the members of the society in 1805 at Harmony, Pennsylvania; in 1821 at Harmony, Indiana, and in 1827 at Economy, Pennsylvania. The articles executed at the latter place and signed by the decedent were substantially the same as those previously executed. After the preamble, which is recited in the opinion, the articles provided, in substance, that the subscribers, for themselves and their heirs, etc., gave, granted, and forever con-

veyed to Rapp and his associates, their heirs and assigns, all their property, real, personal, and mixed, whether consisting of lands, goods, money, etc., as a free gift for the benefit of the association or community; that they covenanted to submit faithfully to the laws of the society, and to yield cheerful obedience to its superintendents, and to promote its interest and welfare, not only by the labor of their hands, but also by that of their children, families, and others under their control; that if at any time or for any reason they should be induced to withdraw from the association, they covenanted never to claim for themselves or their children, or any one belonging to them, any compensation for any services rendered to the association or its members, but that such services should be voluntary and gratuitous; that in consideration thereof Rapp and his associates adopted the subscribers as members, whereby each of them was to obtain for himself and family the privilege of attending the religious meetings of the society and receiving for himself and family all such instructions in church and school as might reasonably be required; that the said Rapp and his associates further agreed to furnish to the subscribers and their families all the necessaries of life, such as clothing, food, lodging, etc., both in health and in sickness, together with such medicines, care, attention, and consolations as they should require, and to care for their children, in case of the death of the parents, so long as they should remain in the association; and also that if any of the subscribers should violate their agreement, or be unable or unwilling to submit to the laws of the community, or should for any reason withdraw from it, Rapp and his associates agreed to refund to them, in one, two, or three annual installments, the value of the property which they brought into the association, without interest, and that if they were poor and brought nothing into the community, yet, if they departed openly and regularly, they should receive a donation in money proportioned to the length of their stay in the community and to their conduct, to such an amount as, in the judgment of the superintendents, they might require. Much evidence was introduced to show that the deceased was induced to execute the conveyance and to sign the articles in question by certain representations addressed to his superstitious fears, the substance of which is stated in the opinion. It appeared also that at the time of joining the association the deceased had a wife and also eight or nine children. The evidence further showed that the society had a large amount of property, con-

sisting of mills, etc., and that the profits of the enterprises in which it was engaged were about one hundred thousand dollars per annum. The verdict and judgment were for the defendants, under the instructions of the court, which it is unnecessary to state, as the questions of law involved are sufficiently discussed in the opinion.

Shaler and Watts, for the plaintiff in error.

Biddle and Forward, for the defendants in error.

By Court, GIBSON, C. J. The points made at the argument are reducible to two; but one of which is attended with difficulty, for it is not susceptible of doubt that the articles and release, if fairly obtained, are conclusive of the right. An association for the purpose expressed, is prohibited neither by statute nor the common law; and it is clear that, except for the amount of its income, this society would be entitled to a charter by our statutes, for self-incorporation. It may be true that the business and pursuits of the present day are incompatible with the customs of the primitive Christians; but that is a matter for the consideration of those who propose to live in conformity to them. Our laws presume not to meddle with spiritualities; and religious societies are regarded by them but with an eye to their temporal consequences. It has not been pretended that this society is detrimental to the public or its neighbors. It is an ecclesiastical community, performing, with alacrity, its duties to the laws, rendering unto Cæsar the things that are Cæsar's—and fashioning its municipal rules of property and government after the models of those Christian societies that existed in the days of the apostles. Its most peculiar features are submission to the will of its founder, and equal participation of property brought into the common stock by individuals or produced by the labor of the whole. That it is not a partnership, results from the fact that the profits are not shared in severalty. At the period of initiation, the neophyte surrenders his worldly wealth to the society, reserving to himself but the contingent right of resumption in the event of his secession, to which none but those who were creditors at the time could object, for all else would deal with him on the basis of a transfer already made. In the present instance, it is not alleged that there were creditors; without which, as was determined in *Buehler v. Gloninger*, 2 Watts, 226, the administrator could not interfere. It is supposed, however, that as the intestate had power, by the articles, to secede from the society and take out

of it whatever he had brought into it, the successor to his personal rights may exercise it as his representative. Such, however, are not the terms of the articles; nor would a posthumous exercise of the power, consist with the disposition he thought fit to make by dying in fellowship. An exercise of it by the administrator of one dead without kindred, would wrest the property from the society only to give it to the estate by escheat. The right of secession, therefore, is intransmissible; and were it not, the intestate's release would be a bar.

The question susceptible of argument, then, is, whether there were such evidence of fraud at the execution of the papers, as might be left to the jury. The matters adduced in proof of it, are the emphatic representations of Mr. Rapp during the transaction. One of the witnesses testified that, "as to the articles signed at Economy, Rapp made a long speech; said every one who would sign would have his name written in the Lamb's book of life; that if they did not, their names would be blotted out, and God would ask him about it; and that the members were induced to sign by what Rapp said." Another testified, that when papers were to be signed, "Rapp prepared their minds for it a long time before; that he made them believe their names would be recorded in the book of life if they would sign; that he more than once said, it would be an unjust God that would bring them to happiness without asking him; and that the doctrine he preached had an effect on Peter Schriber," whom the witness described as a weak old man, who believed on the assurance of Mr. Rapp, that he would see the Lord in person within two years and a half from the time at which he spoke. A third said: "When they wished them to sign, George Rapp always made a long speech about it; said that if they would sign, their names should be written in the Lamb's book of life; that if they did not, their names would be struck out, and they would go to hell. When I signed, he told me so sure as I signed, my name would be in the Lamb's book of life." From this, there is little doubt that he put in action all the springs of his influence, sustained by all his spiritual artillery; and the question is, whether that alone, startling as it may seem, is so indicative of imposition that it may be left to a jury as evidence of it.

Lord Hardwicke's admirable analysis of fraud, in *Chesterfield v. Janson*,¹ 2 Ves. 155, reduces it to four species; such as is constituted of direct imposition; such as may be presumed,

1. *Chesterfield v. Jansen*.

contrary to the general rule, from the relation of the parties; such as may be collected from the intrinsic value of the bargain; and such as arises from the contract being an imposition on third persons. The fraud imputed here belongs to the first; for the bargain is not such as a rational and undeluded man might not make, or one whose consequences may affect those who are not parties to it; nor is it open to objection by reason of the circumstances and position of those who are. The relation of pastor and people, unlike that of *cestui que trust* and trustee, guardian and ward, and attorney and client, is not one which a chancellor views with distrust; not, perhaps, because the laity are sufficiently protected in England by the statutes to suppress superstitious uses; for these operate not on gifts to the established church; but because the relation is essentially a parental one. Are, then, the representations of Mr. Rapp to be pronounced false and evincive of fraud? To say nothing of our judicial incompetence to pass upon the truth, he can not have been guilty of imposition if he actually believed what he uttered; for the suggestion of falsehood, or suppression of truth, which constitutes this species of fraud, is willful. He who conscientiously declares an indifferent or absurd theory to be essential to salvation, may be a fanatic, but he is not a cheat. What more, according to the general perception of divine truth, did Mr. Rapp?

It will not be pretended that there was direct evidence of his insincerity. Nor was it attempted to be shown that he is of superior intelligence or education, or less likely to harbor an extravagant opinion than the rest; or that those who are supposed to be his dupes, were under bodily or mental infirmity, or apprehensive of death, to give him an advantage over them; or that the dogma predicated by him, was more than an ordinary and a standard doctrine of his church. The mind of the intestate had become enfeebled by age; but he had been an orthodox member for more than twenty years, and had, within that time, not only assented to, if not subscribed, previous articles containing the same provision, but had delivered his money to the society as a free and absolute gift while his intellects were in their prime. Were it necessary, therefore, to insist that the defendant's title is independent of the articles, it might be done with entire success. Unless, then, Mr. Rapp were an impostor from the beginning, a conclusion not to be gratuitously drawn in contradiction of the legal presumption of innocence, it is impossible to fix on him a fraudulent design by extrinsic

evidence. What, then, is the intrinsic evidence? No one who has witnessed the workings of fanaticism in the strongest and most cultivated minds, will presume to set bounds to it; or say that the absurdity of a dogma is evidence of the insincerity of him who professes to believe it. To decide a cause by a criterion so uncertain, would be to refer it to the sectarianism of the jury. It will not be said that the grant of a Roman Catholic to purchase *post mortem* masses, would necessarily be fraudulent in Pennsylvania, though their sufficiency to deliver from purgatory had been preached to him *in articulo mortis*; yet it would be easy to predict the event, if the truth of the doctrine were left, as a material question, to a jury of Protestants, few of whom would think it less visionary than the dogma of Mr. Rapp.

Fortunately, the law presumes not to settle differences of creeds and confessions; or to say that any point of doctrine is too absurd to be believed. Now that this power to enroll and blot out, is impliedly asserted in the act of constitution signed at Economy, is apparent in the preamble, which runs thus: "Whereas, by the favor of divine Providence, an association or community has been formed by George Rapp and many others, upon the basis of Christian fellowship, the principles of which, being faithfully derived from the sacred scripture, include the government of the patriarchal age united to the community of property in the days of the apostles; and whereas, the single object sought is to approximate, so far as human imperfection may allow, to the fulfillment of the will of God by the exercise of those affections which are essential to the happiness of man in time and in eternity." Now what was the community of property thus referred to as having prevailed in the days of the apostles, and as being the same that was intended to be revived under its scriptural sanction? It is thus described in the fourth chapter of the Acts: "And the multitude of them that believed were of one heart and one soul: neither said any one of them that aught of the things which he possessed was his own, but they had all things in common. Neither was there any among them that lacked; for, as many as were possessed of lands or houses, sold them and brought the prices of the things that were sold, and laid them down at the apostles' feet: and distribution was made to every man according to his need." That these contributions were not merely voluntary, the awful punishment inflicted on Ananias and Sapphira for concealing a part of the price of their property, as related

in the succeeding chapter, abundantly proves; for though it was demanded by Peter in reprehending their deceit, "while it remained, was it not thine own? and after it was sold, was it not in thine own power?" yet it is not to be credited that they would have been permitted to exercise their right of separate ownership and remain in Christian fellowship. Ananias was emphatically told that he had "lied not unto man, but unto God;" a distinction evincive of the origin of the duty, and the nature of the being who had set him to perform it; and showing that the law for whose violation he was to be struck dead, was not human, but divine. Such, under Providence, was the office and power of an apostle; and it is certain that Mr. Rapp, though not actually an apostle, had reserved to himself the authority of one. It was testified that he held his office, not by the voices of his people, but by delegation paramount—"as Moses and Aaron had held theirs"—and it is matter of history that he assumed it as the spiritual and temporal head, when he founded the society in Germany.

Without, then, arrogating to himself the power to loose and to bind on earth and in heaven, he might conscientiously think conformity to the lives of the primitive Christians to be essential to salvation, and impress it on them in the most striking terms. A vast majority of Christians, undoubtedly, think that the community of property ordained by the apostles, was of special and temporary appointment; but that opinion is, by no means, universal. The Moravians, the Shakers, and perhaps some others, hold a contrary one; and in Mr. Rapp's community, conformity to this regulation is the predominant article of the creed. Then, to say, without express or circumstantial proof, that he did not believe in the indispensableness of it, would be to pronounce him not only a hypocrite, but a hypocrite without a motive. Though the legal title is vested in him as a joint trustee, he has but an equal interest in the beneficial ownership. The basis of the association, it was testified, is "equal rights, equal enjoyments, and equal profits;" and such, too, are the provisions of the articles. The poor enjoy the privileges of those who were rich; and, should a division take place, would share in proportion to their original contributions. On this plan, it is impossible for Mr. Rapp to enjoy more than another; or to increase his wealth by taking out of the stock more than he put into it.

The sum of the matter is, that a member of a religious society may not avoid a contract with it on the basis of its pecu-

liar faith, by setting up the supposed extravagance of its doctrines as proof that he was entrapped. The proper limitation to this would seem to be, that such a contract, with a society whose principles would shock the moral or religious sense of the community, which is a legitimate subject of legal protection, would be void for illegality. But such is not the society of George Rapp; and beside, that ground of defense has not been taken. Nor is it necessary to the protection of the ignorant that the law should presume the existence of clerical hypocrisy without proof of it. The course of an impostor is always sufficiently marked with contradiction to afford proof of artifice. Here, however, there was not only no extrinsic proof of imposition, but much that bore the other way; yet, without evidence to raise it, the question of fraud was left to the jury, and consequently, not injuriously to him who complains of the manner of it. The manner is immaterial, as he was not entitled to the benefit of the inquiry at all; and, independent of the objections to the form of the action, which it is unnecessary to decide, he was not entitled to a verdict.

Judgment affirmed.

COVENANT OF A MEMBER OF THE SOCIETY OF SHAKERS never to make any claim for compensation for his services, is not in violation of any constitutional right, and is not void: *Waite v. Merrill*, 16 Am. Dec. 238. See also *Gass v. Wilhite*, 26 Id. 446.

FORSYTHE v. NOBCROSS.

[5 WARR, 432.]

ENTRIES BY A BLACKSMITH ON A SLATE, and transferred to a book four or five-days afterwards, are not admissible in evidence as original entries in such book, though such be the custom among blacksmiths.

ERROR to the common pleas of Fayette county, in an action of assumpsit on a book account. A book was offered in evidence, which the plaintiff swore was his book of original entries, but it appeared that the entries were first made on a slate, and transferred to the book after four or five days, and that such was the custom among blacksmiths in that vicinity. The book was admitted against the defendant's objection. Verdict and judgment for the plaintiff, and the defendant sued out this writ.

Deford, for the plaintiff in error.

Flanagan, for the defendant in error.

By Court. An entry on a card or a slate is but a memorandum preparatory to permanent evidence of the transaction, which must be perfected at or near the time, and in the routine of the business. But the routine must be a reasonable one; for there is nothing in the condition of a craftsman to call for indulgence till his slate be full, or till it be convenient for him to dispose of the contents of it. In *Ingraham v. Bockius*, 9 Serg. & R. 285 [11 Am. Dec. 730], and *Patton v. Ryan*, 4 Rawle, 410, the entries were transferred the same evening or the next morning; and they ought in every instance to be so in the course of the succeeding day. In *Vicary v. Moore*, 2 Watts, 458 [27 Am. Dec. 323], entries transferred from scraps of paper carried about in the pocket during one or more days, were held to be inadmissible; and on this principle, the book was, in the present instance, incompetent.

Judgment reversed, and a *venire de novo* awarded.

BOOKS OF ORIGINAL ENTRY AS EVIDENCE: See on this subject *Ingraham v. Bockius*, 11 Am. Dec. 730, and the note thereto. See also, *Merrill v. Ithaca etc. R. R. Co.*, *ante*, 130, in the note to which other cases and notes in this series on the same subject are collected. That entries not made within the day succeeding the transaction, or for several days afterwards, are not admissible in evidence, is a point to which *Forsythe v. Norcross* is cited in *Gaines v. Relf*, 12 How. (U. S.) 572. The case is followed as an authority to that effect in *Cook v. Ashmead*, 2 Miles, 268.

DOUGHERTY v. JACK.

[5 WATTS, 456.]

VOLUNTARY CONVEYANCE IN PENNSYLVANIA is not void by the statute of 27 Elizabeth, if not actually fraudulent.

MERGER IS NOT FAVORED IN EQUITY, and where a term for years and the fee meet in the same person, the former will not be merged in the latter if the continuance of the term is necessary to the protection of the owner of the inheritance, though the term would be merged at law.

ERROR to the common pleas of Alleghany county. The case is stated in the opinion.

Forward, for the plaintiff in error.

Fetterman and Foster, for the defendant in error.

By Court, ROGERS, J. This was an action of ejectment to recover the possession of fifty acres of land. The plaintiff gave in evidence an article of agreement between John Dougherty, under whom both parties claim title, and James Wilson, dated

the second of October, 1829, by which Dougherty agrees, for the consideration therein mentioned, to convey the land in dispute to James Wilson. Wilson assigns the article to Jack on the eleventh of January, 1830; and John Dougherty, on the same day, for the consideration of one dollar, conveys the property to Jack. The defendant alleges duress, fraud, and want of consideration in the agreement between Wilson and Dougherty, and in the agreement and deed of Dougherty to Jack; and that, on the sixth of January, 1829, which was before the agreement between Dougherty and Wilson, Dougherty had leased the premises to the defendant for the term of ten years, which is not yet expired. By the article, John Dougherty agrees to lease the premises in question to James Dougherty for the term of ten years, from the first of April then next ensuing. The consideration is expressed to be a small sum, not exceeding one hundred dollars, which is considered to be the due of John Dougherty, the father of John and James; and for which the said John Dougherty, the father, is to have a living, for the said space of time, should he choose to live with James, etc. The main intention of the parties to this agreement would appear to be to provide an asylum and comfortable subsistence for their father, at an expense which, as is expressed in the contract, should not be exorbitant. It is not very clear whether this agreement was in payment of a debt, owing by John to his father, or whether it was a settlement made for natural love and affection; nor do I deem this of any importance. The plaintiff does not claim the property as a creditor, but as a purchaser for a valuable consideration. It is also certain that Wilson knew of the agreement, as he is a subscribing witness to it; and there is every reason to believe Jack was apprised of it also. The fact that Jack was a creditor will not alter the case, for the debts are but the consideration for the conveyance. He must still be regarded as a purchaser. Conceding that the lease was a voluntary deed, yet the defendant has a right to hold the premises until the expiration of the term; provided the transaction be untainted with actual fraud; for in *Lancaster v. Dolan*, it is decided, that, in Pennsylvania, a voluntary conveyance is not void against a subsequent purchaser by force of the statute 27 Elizabeth. Actual fraud is not alleged; so that, if Jack had notice of the agreement between John and James Dougherty, there is no valid defense to the suit, at least until the expiration of the outstanding term. And this would seem to have been the understanding at the trial, but the court instructed the jury

that this consequence is avoided by the conveyance of the eleventh of January, 1830.

The agreement of the sixth of January, 1829, is not only for a lease, but it is also a conditional sale; for the parties agree, that after the expiration of the ten years, if James thinks proper, he may, by the payment of four hundred dollars, entitle himself to a deed in fee simple for the land. In anticipation of that period the deed was made; and the question is, whether the deed merges the agreement. It has been before remarked, that the agreement is not only for the benefit of James, but of John Dougherty; and hence it is necessary to preserve the term in order to protect his interest. No act of James and John, without his consent, could merge his interest; and beside, it is not for the benefit of James that the term should merge in the inheritance; nor can that, by any fair construction, be held to be the intention of the parties to the contract. When the legal ownership of the inheritance and the term meet in the same person, a legal coalition occurs; and, at law, the term, which before was personal property, falls into the inheritance and ceases to exist. But in equity another kind of ownership takes place, being an equitable or beneficial ownership, as distinguished from the mere legal title. A merger is not favored in equity, and is never allowed unless for special purposes, and to promote the intention of the party. It is only in those cases where it is perfectly indifferent to the party in whom the interests had united, whether the charge or term should or should not subsist, that in equity the term is merged: *Forbes v. Moffat*, 18 Ves. 394. Here, the continual existence of the term is necessary, as has been before observed, for the protection of the owner of the inheritance as a merger, would sweep from him all his interest, whether real or personal, in the estate; and has also the additional effect of destroying the interest of the person for whose benefit principally the term was created. It results from these uncontested principles of equitable jurisprudence, that there was error in instructing the jury, that the term merged in the fee; and that the lease was no bar to the action unless the transaction be tainted by actual fraud. On the point of duress the court have distinctly recognized the principle established in *Stauffer v. Latshaw*, 2 Watts, 162 [27 Am. Dec. 297], and have left the question of fraud as an open one to the jury; so that on this and on the other part of the record, there is no tangible error.

Judgment reversed, and a *venire de novo* awarded.

VOLUNTARY CONVEYANCES, VALIDITY OF.—As to the Pennsylvania doctrine on this point, see *Lancaster v. Dolan*, 18 Am. Dec. 625 and note. The decisions generally on this subject in this series are collected in the note to *Egleberger v. Kibler*, 26 Id. 192. See also *Whittlesey v. McMahon*, Id. 382; *Wood v. Jackson*, 22 Id. 603; *Williams v. Walton*, 29 Id. 122.

MERGER.—See on this subject the notes to *Hitchcock v. Harrington*, 5 Am. Dec. 233; *James v. Morey*, 14 Id. 512; *Speed's Ex'rs v. Hann*, 15 Id. 81. See also *Freeman v. Paul*, 14 Id. 237. The doctrine laid down in *Dougherty v. Jack*, that the question whether merger of a term or incumbrance in the inheritance shall take place or not, is generally regarded in equity as depending on the intention of the party in whom the interests are united, and that an intention that merger shall take place will not be presumed in the absence of evidence, against the interest of such party, is approved in *Huston v. Wickersham*, 8 Watts, 523; *Helmbold v. Man*, 4 Whart. 422; *Pennington v. Coats*, 6 Id. 283; *Richards v. Ayres*, 1 Watts & S. 487.

CLAASEN v. SHAW.

[5 WATTS, 468.]

BOND NOT GOOD AS STATUTORY BOND, WHEN.—A bond taken by a constable before a levy of an execution in his hands, from a stranger, for the payment of the amount of the execution or the delivery of property sufficient to satisfy it, in consideration that he will stay proceedings, where the statute authorizes a bond after levy executed by the debtor with sureties for the delivery of the property levied or payment of the execution, is not good as a statutory bond.

SUCH BOND IS GOOD as a common law obligation.

AVERTMENT THAT SUCH BOND WAS TAKEN FOR EASE AND FAVOR in a plea to an action thereon is immaterial and need not be traversed.

ERROR to Westmoreland county, in an action brought in the name of Shaw, for the use of Charles Winel and wife against Claasen on a certain bond executed by the defendant to the said Shaw, conditioned in substance that if the said Shaw, who was a constable, would cease to execute a certain execution in his hands in favor of the wife of the said Winel against certain other parties, and would stay all proceedings thereon, the said Claasen would, on a certain day named, pay the amount of the debt, interest, and costs indorsed on the said execution, or would deliver at a certain place, property sufficient to satisfy the same. The defendant pleaded substantially that the said bond was not taken after a levy of the execution, as provided by statute, and was not in form or substance such a bond as was provided for in the statute, and that the same was taken for ease and favor. This latter allegation was not traversed by the plaintiff. Other facts appear from the opinion. Judgment for

the defendant, and the plaintiff brought error. The grounds relied on sufficiently appear from the opinion.

Armstrong, for the plaintiff in error.

Kuhns, for the defendant in error.

By Court, ROGERS, J. The eighteenth section of the act of the twentieth of March, 1810, authorizes a constable who levies an execution, issued from a justice of the peace, to take a bond, in the following, or like words, viz.: We, A. B. and C. D., or either of us, are held, and firmly bound with E. F., constable, in the sum of —, upon condition that the said A. B. shall deliver unto E. F. aforesaid, the following goods and chattels — on the — day of —, at the house of —, which is taken in execution at the suit of G. H. against A. B., or pay the amount of the said execution, with costs. Witness our hand and seals, etc. The bond is taken for the forthcoming of goods, on which the constable has previously levied, and is a bail bond, which it is intended shall be executed by the defendant, with surety, conditioned in the alternative, either for the delivery of the goods taken in execution, or for payment of the amount of the execution, with costs. The obligation, on which suit is brought, differs not only in form, but in substance, from the bond prescribed in the act. The obligation is given to a constable by a stranger, to which the defendant in the execution is no party, with condition to deliver property, other than the property levied, or (for in truth no levy was made) to satisfy the debt, interest, and costs. These are substantial variances which avoid the instrument as a statutory obligation, the distinction being between a variance in form and substance. The former does not avoid the bond, but the latter does, as has been held in repeated decisions. If anything be added to the condition prescribed in the act, which is not legal, that which is inserted against the form of the act, avoids all the rest: *Plowd.* 66; *10 Rep.* 100. But if a bond be taken, in a circumstance contrary to the provisions of the statute, that is only prescribed for the direction of the sheriff, as to take sureties, which is for his safety; or if anything is required specially by the condition, that the act only imports, but does not literally require, such variations do not hurt: *Beaufage's case*, *10 Co.* 100; *Webb v. Clifton*, *Cro. Eliz.* 808; *Blackbourn v. Michelbourn*, *Id.* 852; *Farmers' Bank in Reading v. Boyer*, *16 Serg. & R.* 4.

Being therefore void as a statutory obligation, the question

is, is it good at common law? And we are of the opinion that it is, on the authority of *Beaufage's case*, 10 Rep. 99. A bond to pay money into court, at the return of a *feri facias*, is good: for, although it be done by color of office, and the condition is not according to the statute, yet it is valid, for the statute 23 Hen. VI., c. 9, extends only to bonds by or for prisoners. In *Beaufage's case* the doubt was, upon the general words of the act, that if the sheriffs, or any other officers, take any other obligation, in other form than is prescribed in the act, by color of their offices, the bond shall be void. The court, however, held, upon full consideration, that since the statute 23 Hen. VI., upon a *feri facias* delivered to the sheriff, he may take a bond from the defendant to pay the money into the court at the return of the writ. And if he can take a bond from the defendant, there is no reason why he can not take one from a stranger for a similar purpose. Before the statute the sheriff was not obliged to admit a person to bail, who was arrested on mesne process, unless he sued out a writ of mainprize, though he might have taken bail of his own accord. This arbitrary power in the sheriff, of admitting or refusing bail, produced great extortion and oppression, and hence the passage of the statute by which the sheriff, who arrests a person on mesne process, in a civil suit, is not only authorized, but obliged to take a bail bond, if sufficient surety is offered, otherwise he subjects himself to an action by the party aggrieved. It is obvious that a bond, taken for the payment of money, on a *feri facias*, does not come within the mischief, nor is it within the purview of the statute. And, therefore, since the statute 23 Hen. VI., it was held in *Beaufage's case*, already cited, when a *feri facias* is delivered to the sheriff, he may take a bond of the defendant, and, as before observed, of a stranger, to pay the money into court at the return of the writ; such bond is not within the statute 23 Hen. VI.; for that statute, as is there held, extends only to such bonds, which any in his ward makes to the sheriff, but is good at common law. Here, the writ was directed to the constable, and although, by the requirements of the eleventh section of the act of the twentieth of March, 1810, the execution performs the double office of a *feri facias* and *ca. sa.*, yet it is only for want of sufficient distress, that the constable, under his writ, can take the body of the defendant into custody.

In the absence of any averment, in the defendant's plea to the contrary, we must intend that there were goods and chattels,

on which a levy may have been made, sufficient to answer the plaintiff's demand, and, of course, the defendant's body was not liable to be taken in execution; and this brings it within the principle of *Beaufage's case*, already cited. The defendant avers in his plea, that the bond was taken for ease and favor, and this raised a doubt whether, on the authority of *Sir John Lenthall v. Cooke*, 1 Lev. 254, where it was held that the traverse for the ease and favor is the most material thing: the want of the traverse did not vitiate the plea. But that was a case where the defendant was a prisoner in execution, and on that ground it was ruled, that the traverse of the ease and favor was material. In answer to the argument urged at the bar, that the traverse was immaterial, the court say, that the traverse for the ease and favor is the most material thing, and it may well be intended to be taken for the better security of his imprisonment—for the prisoners of the king's bond are so numerous, that the house can not hold them, but they are permitted to lodge within the rules, and therefore, there is good reason to take security for their true imprisonment, and constant usage has been, to take such obligations. It is obvious, therefore, when the defendant is in custody, that the intention of taking the bond becomes material, and, like every other material averment, must be traversed. Not so when the bond is taken on a *fieri facias*, for it is of no consequence what the intention of the parties may be, for the bond is good notwithstanding; and hence, the averment that it was taken for ease and favor is immaterial, and there is no necessity to tender a traverse on an immaterial averment.

Judgment affirmed.

BOND TAKEN WITHOUT AUTHORITY OF ANY STATUTE, when good as a common law obligation: See the note to *Harris v. Simpson*, 14 Am. Dec. 103. See also *Debard v. Crow*, 22 Id. 113. A bond taken by a sheriff, *colore officii*, for the performance of conditions unauthorized by statute, is void: *Smith v. Allen*, 21 Id. 33. That a bond or undertaking entered into under a statute, but which is not in accordance with the statute, and therefore void as a statutory bond, may nevertheless be good as a common law obligation, if it contain no condition contrary to those prescribed or contrary to law, is a position for which the authority of *Claasen v. Shaw* is recognized in *Sweetser v. Hay*, 2 Gray, 52. In *Koons v. Seward*, 8 Watts, 389, the case is cited, and it is held that a bond taken by an officer to procure the release of a prisoner arrested under a *capias ad respondendum*, but substantially varying from the requirements of the statute, would not be valid as a statutory bond nor as a common law obligation if taken for ease and favor, but that if such a bond were given, not to the officer, but to the party himself, though void as statutory bond, it would be a good common law obligation.

MARTIN v. McCORD.

[5 WATTS, 483.]

EXECUTED CONTRACT NOT WITHIN STATUTE OF FRAUDS.—Where one agrees by parol to give a lot of ground in consideration that certain of his neighbors will build a school-house thereon for the use of the neighborhood, and the house is built accordingly, they become purchasers of the land, and the title passes to them, notwithstanding the statute of frauds, as trustees for the purpose contemplated.

SUCH A TRUST IS NOT TOO VAGUE or uncertain to be enforced.

PERSONS IN THE NEIGHBORHOOD ARE COMPETENT WITNESSES, in such a case, where they have released their interest or removed from the neighborhood.

SUCH A SCHOOL IS NOT WITHIN THE STATUTE relating to the districting of townships.

ERROR to the common pleas of Alleghany county, in an action of trespass *quare clausum fregit*, to which not guilty and *liberum tenementum* were pleaded. The premises upon which the alleged trespass was committed, consisted of a certain lot and a school-house erected thereon. One Ross formerly owned the land of which the lot was part, and in 1830 proposed to some of his neighbors to give the lot for a school-house, if they would build such a house thereon for the benefit of the neighborhood and of his own grandchildren. A subscription was accordingly raised and the house erected, the lot having been surveyed by Ross' direction for that purpose. Ross promised to give a deed, but never did so, and finally refused to do so, after the house had been completed, and was occupied as a school. The defendants were chosen trustees of the school by the subscribers to the fund, for the erection of the house. The plaintiff claimed under a conveyance from the residuary devisees of Ross, now deceased. The court below instructed the jury, that the agreement under which the lot was given for a school was binding, and not within the statute of frauds, and that the plaintiff could not recover. Verdict and judgment for the defendants. The plaintiff brought the case here, alleging error in the instructions, and also in certain other rulings sufficiently noticed in the opinion.

Metcalf and Lowrie, for the plaintiff in error.

Forward, contra.

By COURT, SERGEANT, J. This case has been argued in the court below and here by the plaintiff, as if it involved the question how far a parol gift of land was valid under our act of

assembly against frauds and perjuries. And were that the question, it was settled in *Syler v. Eckhart*, 1 Binn. 378, that a parol gift of land, accompanied with delivery of possession, and followed by the making of valuable improvements by the donee, passes a valid title. But the truth is, this is not the case of a gift. Taverner Ross, the owner of this small piece of ground, agreed with certain of his neighbors, that if they would raise funds to build a school-house on the premises, for the use of the neighborhood and one of his grandchildren, he would contribute the ground: and they did raise the funds and build the house; bestowing, by their money and labor, considerably more than the value of the lot. They became thereby purchasers of the ground; and it is the case, not of a gift, but of a purchase for valuable consideration, accompanied with possession and the making of valuable improvements under the eye of the former owner, and by his assent and direction. Such a case is clearly unaffected by the statute, and passes a good title to the persons subscribing and building the house. If it were otherwise, it would enable those claiming under the donor to commit a fraud, and regain the property with the improvements made by others under his agreement. The title became vested in the subscribers and contributors by the agreement and payment of their money; they hold it, not for themselves, but as trustees, for the purposes originally designated. The donor had no interest in it but the share which became his by the gift of the land, and that passed only a right coequal with the others in the management of the property. This was all that could pass by his residuary devise, and gives the plaintiff no right to take possession and oust the trustees. He has no more right to do so than any third person. The school-house and lot of ground belong to those who contributed their money, property, or labor to build it. They, with T. Ross, embarked jointly, in this benevolent project, and they have a right to hold and possess, and employ the school-house. They are bound, however, to employ it for the purposes originally contemplated in its erection; and for any perversion of the trust would be liable, as other trustees for charitable uses, to the supervision and control of the courts. It does not appear, that any complaint of this kind was ever made; on the contrary, certain persons were annually elected, called trustees, who devoted their time and attention to it, employed a female teacher, and conducted the school until the plaintiff thought fit to disturb it by taking possession.

It is said that this trust is vague and uncertain: that it can

not be ascertained who are the neighborhood. If the trust were so vague and uncertain as to be incapable of being enforced, it would not follow that the plaintiff would be entitled to the property: it would remain still with those who had paid their money for it; the plaintiff's right being no more than the share which was equivalent to the value of the ground when given. But it is not true that the trust is so vague as to be incapable of execution. It is the neighborhood that are to enjoy the benefits of the school; and the extent of the charity must be governed by circumstances. The subscribers were neighbors; and they, at least, would be entitled to the benefit of it; and afterwards such others as, in the exercise of a just discretion by those who had its management, could be conveniently received and educated there. The rule on this subject is stated by Chief Justice Gibson in delivering the opinion of the court in *Wilman v. Lex*, 17 Serg. & R. 93 [18 Am. Dec. 644], "that it is immaterial how uncertain the objects may be, provided there is a discretionary power vested anywhere over the application of the testator's bounty to those objects." This discretion is in the present case vested in the subscribers or their representatives, or those to whom they delegate the management of the trust. Charity schools have been favorites in Pennsylvania. They were introduced shortly after the arrival of William Penn in the parts of the state first settled, and have since been common. No question, till of late years, was ever made of the legal validity of such trusts; and the integrity and benevolence of their founders and managers have, with but few exceptions, rendered any aid from the laws unnecessary. When, however, such establishments were questioned, as in *Wilman v. Lex*, they were supported under a common law of our own, which had grown up by general consent and usage, by which, without the direct force of the statute of 43 Eliz., all its beneficent provisions were recognized, so far as they applied to the charitable institutions subsisting among us. We are, therefore, of opinion that the plea of *liberum tenementum* was not supported, and that the errors assigned in the charge of the court and in the admission of the plaintiff's evidence are not sustained.

Some exceptions to the admission of witnesses were taken, which remain to be noticed. The first bill of exceptions was abandoned on the argument here. The second, fourth, and sixth bills relate to admission of certain witnesses on the part of the plaintiff who were or had been neighbors, but had released all their interest or removed from the neighborhood.

Whatever interest these witnesses had, whether so defined and certain as to prevent their admission, or so remote and contingent as not to be a valid ground of objection, was removed before they were sworn. Jack had left the neighborhood and ceased to have any right to participate in the benefits of the school. Dodd, Denny, and Barr divested themselves of all such interest by their releases. Lewis Ross did the same. He was one who helped to erect the building: he had an interest in it beyond the mere right of a neighbor; but he might transfer that interest and release the right. We think these witnesses were properly admitted.

The matter offered as contained in the sixth bill of exceptions was properly rejected as irrelevant. It could be of no importance to the validity of this institution, or to the rights of the parties, whether the township had been districted under the school law of Pennsylvania, or whether the school-house in question was near the center of the district. The act of assembly, in providing for public schools in various districts of the state, does not supersede or abolish charity schools. There is room enough for all. We are yet far from having reached such a point in education as to be inclined to complain that there are too many schools in the state.

Judgment affirmed.

EXECUTED CONTRACT NOT WITHIN THE STATUTE OF FRAUDS: See *Wack v. Sorber*, ante, 269, and other cases in this series on that subject cited in the note to that decision. A parol agreement concerning land, which was very similar to that passed on in the principal case, was enforced, on the ground of its having been executed on one side, in *Beaver v. Filson*, 8 Pa. St. 327, on the authority of *Martin v. McCord*.

TRUSTS IN FAVOR OF UNINCORPORATED CHARITIES, WHEN ENFORCED: See *Methodist Church v. Remington*, 26 Am. Dec. 61, in the note to which the previous cases in this series on the same subject as well as those relating to charitable uses generally, are collected. See also, *Going v. Emery*, Id. 645. That a trust in favor of a charity is not forfeited by non-user, is a point to which the principal case is cited in *Kirk v. King*, 3 Pa. St. 441; *Wright v. Linn*, 9 Id. 434; *McKissick v. Pickle*, 16 Id. 148. In *Pepper's will*, 1 Pars. Sel. Cas. 451, the case is referred to among others as showing that though the statute of 43 Eliz. is not in existence in Pennsylvania as a statute, yet its beneficent provisions have been in force by common usage and constitutional recognition.

TRUST MAY BE ESTABLISHED BY PAROL in Pennsylvania: *Swartz v. Swartz*, 4 Pa. St. 359; *Lloyd v. Carter*, 17 Id. 221; *Freeman v. Freeman*, 2 Pars. Sel. Cas. 86, all citing the principal case as an authority for this doctrine. See on this point the note to *Towles v. Burton*, 24 Am. Dec. 413, and *Hoge v. Hoge*, 26 Id. 52 and note.

BARNES v. DEAN.

[5 WATTS, 542.]

OWNER OF LAND IS NOT LIABLE IN TRESPASS for cutting and carrying away the grain or grass of one in wrongful possession.

ERROR to the common pleas of Butler county, in an action of trespass, to which *liberum tenementum* was pleaded. The alleged trespass consisted in cutting and carrying away certain grain, etc. The judge instructed the jury, in substance, that if the plaintiff was, at the time of the act, and had been for some years, in the actual possession of the land, though the title to it was in those under whom the defendant claimed, then the plaintiff should recover. Error was assigned in these instructions after verdict and judgment for the plaintiff.

Purviance and Gilmore, for the plaintiff in error.

Ayres, for the defendant in error.

By COURT. The matter for consideration is, the propriety of the direction that the owner of the freehold may not cut or carry away the grain or grass of one in wrongful possession. The error of this is palpable. At the common law, an entry by force was justifiable both civilly and criminally, with the single qualification that wanton violence was not used. The owner was not at liberty to beat the intruder; but he might overcome resistance by force, or, as the law expresses it, "gently lay hands on him." But no degree of violence to objects that are a part of the freehold, could make him answerable by indictment or action. The frequency of actual collision from this, induced the legislature to interfere for the preservation of the public peace, but not for the disturbance of private rights. The statutes of forcible entry, declare many things criminal in relation to the public, that are entirely justifiable betwixt the parties; and this is one of them. That the common law remains the same as to remedy by action, is shown by the pleadings. The parties have put the question exclusively on the defendant's title to the freehold; and it was error to lead the jury to a decision of it on anything else.

Judgment reversed, and a *venire de novo* awarded.

OWNER OF LAND NOT LIABLE IN TRESPASS TO ONE IN WRONGFUL POSSESSION: See *Hyatt v. Wood*, 4 Am. Dec. 258; *Wilsons v. Bibb*, 25 Id. 118. Therefore a plea of *liberum tenementum*, since it is an assertion of title in the defendant, *Wilsons v. Bibb*, *supra*, is a good plea in bar of an action of trespass *quare clausum fregit*: *Crockett v. Lashbrook*, 17 Id. 98; *Tribble v. Frame*, 23 Id. 439.

CASES AT LAW
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

JOHNSON'S ADM'X *v.* BOUNETHEA.

[3 HILL LAW, 15; S. C., 1 RILEY LAW, 9.]

NEW PROMISE—WHAT SUFFICIENT TO REVIVE DEBT BARRED BY THE STATUTE OF LIMITATIONS.—A debtor by saying that he has an account against his creditor which he will discount against his claim, and that he will settle with him when such account is made out, makes a sufficient acknowledgment of, and promise to pay the debt, to take the case out of the statute of limitations.

ASSUMPSIT on open account for medical attendance. Pleas, the statute of limitations, and the general issue. The debt was barred, but the plaintiff, to avoid the bar, proved that when the agent of plaintiff's intestate presented the account to the defendant, the latter said: "I have also an account against Dr. Johnson, which I will discount against his, when I get mine made out, and will settle with you." It was shown that Dr. Johnson's account was delivered to the defendant. The jury found for the plaintiff, allowing the defendant the amount of his demand. The defendant appealed, and moved for a new trial on the ground that the evidence was not sufficient to revive the right of action, and take the case out of the statute of limitations.

By Court, JOHNSON, Chancellor. This case falls very clearly within the rule laid down in *Young v. Monpoey*, 2 Bail. 280. The evidence adduced in support of the new promise imports, I think, not only an admission of a subsisting debt, but also a promise to pay. The proposition of the defendant to discount his own account against the demand, is, in itself, a distinct confession of his liability to pay it; and his declaration that he

would "settle" with the plaintiff's agent when his account was made out, is, in common parlance, generally substituted for a direct promise to pay, and, as used here, would scarcely admit of any other construction. The verdict is therefore right.

There is, I am aware, a very general prejudice against a defense founded entirely on the statute of limitations, and there is danger that juries will be disposed to infer a new promise from very slight circumstances, and thus render the rule inoperative; but the corrective is in the hands of the court, and by keeping the principle constantly in view, the evil will be avoided.

Motion dismissed.

RICHARDSON, O'NEALL, and BUTLER, JJ., and Chancellors DESAUSSEURE and JOHNSTON, concurred.

NEW PROMISE OR ACKNOWLEDGMENT TO REVIVE DEBT.—See *Neolin v. Duncan*, 25 Am. Dec. 66; *Austin v. Bostwick*, Id. 42, note 45; *Frey v. Kirk*, 23 Id. 581, note 588; *Olcott v. Scales*, 21 Id. 585, note 588; *Coit v. Tracy*, 20 Id. 110; *Glenn v. McCullough*, 18 Id. 661, note 662, where other cases in this series are collected.

CORBETT v. COCHRAN.

[8 HILL LAW, 41; S. C., 1 RILEY LAW, 44.]

PROMISE TO PAY DEBT OF ANOTHER, IN CONSIDERATION OF THE LATTER'S DISCHARGE THEREFROM, is an original undertaking, not required by the statute of frauds to be in writing; nor does such an undertaking require a consideration moving between the person promised for and the person who promises.

CONSIDERATION TO SUPPORT SUCH PROMISE NEED NOT BE A PECUNIARY ONE, nor even one beneficial to the promisor; if it be a loss or inconvenience to the promisee, it is sufficient.

ASSUMPSIT on merchant's account, for goods sold and delivered. The jury, under the instruction of the court, found for the plaintiff, and the defendant appealed and moved for a new trial, on the ground of misdirection. The other facts are sufficiently stated in the opinion.

Holmes, for the appellant.

By Court, EARLE, J. The case made on the trial below, seems to be this: Mrs. Pellott being indebted to the plaintiff, in the sum of four hundred and seven dollars and sixty-ninements, on a book account for merchandise, and the account being presented to her for payment, the defendant came to the plaintiff, produced

the account, and assumed to pay it in consideration that she should be discharged from the debt. Her account was accordingly credited in full, and the amount was charged to the defendant, by his own direction. In the argument here, a question has been raised, whether Mrs. Pellott was privy to the arrangement by which the defendant assumed the payment of her debt; and whether the credit, discharging her, was entered with the knowledge and by the direction of the defendant. Both these were questions for the jury. It was only on proof of both, that the liability of the defendant arose. And I think that the jury were warranted in the conclusion that the defendant, when he exhibited Mrs. Pellott's account, and assumed the payment of it, came from her, and with her consent, for that purpose. And also, that the credit given to her, on the books, was by the direction of the defendant, and in pursuance of the agreement with him; for his undertaking was to pay her debt, in consideration that she should be discharged. The questions raised below, were: 1. Whether the undertaking was void, under the statute of frauds, not being in writing. 2. Whether the debt of Mrs. Pellott was actually discharged. It seems hardly necessary, at this day, to speak of the distinction between original and collateral undertakings, in reference to the statute of frauds, a distinction so well understood, and so well established by the whole current of authorities. The general rule is well stated in Comyn on Contracts: "If it be part of the agreement, that the original debt be discharged, that is a sufficient consideration to support the undertaking of another to pay the debt; and the agreement need not be in writing. But if no such stipulation be made, and the original debt be permitted to subsist, the undertaking is merely collateral, and the agreement must be in writing." Says Justice Nott, in *Boyce v. Owens*, 2 McCord, 208 [13 Am. Dec. 711]: "The reason is obvious. The original debt being extinguished, it is no longer an undertaking to pay the debt of another, because there is no such debt existing, but it is a newly-created debt of the undertaker."

The principle is well put by Roane, J.: *Waggoner v. Administrators of Gray*, 2 Hen. & M. 603: "Where the person, on whose behalf the promise is made, is not discharged, but the person promising agrees to see the debt paid, so that the promisee has a double remedy, the promise is considered collateral, and must be in writing; but where the promisor undertakes to become the paymaster, it becomes immediately his

debt, and he is liable without writing." The consideration to support an agreement, need not of necessity be a pecuniary one, nor even a beneficial one, to the person promising. If it be a loss, or even an inconvenience, to the promisee, the relinquishment of a right, as the discharge of a debt, or the postponement of a remedy, as the discontinuance of a suit, or a forbearance to sue, it is enough. In relation to the class of contracts we are now considering, where the promise is to pay another's debt, in consideration of his being discharged, it seems to be well settled now, that there need be no consideration moving between the person promised for, and the person who promises. For the undertaking of one man, for the debt of another, says Lord Eldon, in *Ex parte Minet*, 14 Ves. jun. 190, "does not require a consideration moving between them." *Vide* 9 East, 348,¹ 1 Camp. 242;² 8 Johns. 29.³ In the earlier cases on this point, such promises seem to have been supported, rather on the ground of their being a purchase of the debt, than a mere undertaking to pay. So they seem to be regarded by Mr. Roberts in his treatise on the statute. Such was the case in *Anstey v. Marden*, 1 New Rep. Bos. & Pul. 124, decided in 1804, where A. being insolvent, a verbal agreement was entered into between several of his creditors, and B., who was father-in-law, whereby B. agreed to pay the creditors ten shillings in the pound, in satisfaction of their demands, which they agreed to accept, and to assign their debts to B., and it was supported as an original undertaking. Sir James Mansfield, C. J., at the trial, considered it not within the statute, being an undertaking to pay a debt of a new description, ten shillings in the pound, in consideration of A. being discharged, and not an undertaking to pay the debt of A. But afterwards, on a rule for a new trial, it seems to have been put on the footing of a purchaser of the debts. The case of *Castling v. Aubert*, 2 East, 325, had before been determined on the same ground.

But it would seem, if no consideration is necessary, as between the person promised for and the person promising, and the loss or inconvenience to the promisee, by reason of discharging the debt of the former, be a sufficient consideration for the new undertaking, that there can be no sufficient reason for holding that the promisor should have the former debt assigned to him for his indemnity, as in *Anstey v. Marden*, or should have funds in his hands to reimburse himself, as in *Castling v. Aubert*; and so it was considered in *Goodman et al.*

1. *Stadt v. Lill*.

2. *Stapp v. Lill*.

3. *Leonard v. Vredenburg*; 8, C., 5 Am. Dec. 217.

v. *Chase*, 1 Barn. & Ald. 297, in 1818. The plaintiff had taken Chase, jun., in execution, and the defendant (his father), in consideration that the plaintiff would discharge him, undertook to put him again in custody on a day certain, or pay the debt. Whereupon, the plaintiff discharged Chase, jun., out of custody; and it was held that the promise of the defendant was binding, though not in writing; that it was an original undertaking, and not collateral. Lord Ellenborough said it was unnecessary to hear counsel on the case of *Wain and Warblers*, inasmuch as it appeared to them that the plaintiff, by agreeing to let Chase, jun., out of custody, had entirely discharged the debt, as to him, and then the case would be that the defendant promised to pay a certain sum of money, in consideration of the debt between the plaintiff and Chase, jun., being put an end to, which being a detriment to the plaintiff, would be a good consideration for an original promise, and take the question entirely out of the statute of frauds. So in *Roe v. Hough*, 1 Salk. 29, soon after the statute, which I shall presently cite for another purpose, A. was indebted to B., and C., in consideration that B. would accept him, C., as his debtor in the place of A., undertook to pay B. the debt of A. It was held a good consideration and the promise binding; and all the authorities are now to the same effect.

I have thus far remarked on this branch of the case, because we have no precedent in our own reports of an undertaking to pay the debt of another, on the sole consideration of the discharge of such debt. But the exception mainly urged here, is that the promise of the defendant was without consideration, as in point of fact and law, the debt of Mrs. Pellott was not discharged.

In considering this question, we should bear in mind the distinction between a release and payment, between that which is to operate as a relinquishment to the debtor of a right of action, and that which is accepted in discharge or satisfaction of the debt. In regard to the former it is laid down: "An express release must regularly be in writing and by deed, according to the common rule, *eodum modo quo oritur, eodum modo dissolvitur*, so that a duty arising by record, must be discharged by matter of as high a nature, and so of a bond or other deed. But a promise by words may, before breach, be discharged or released by words only:" Bac. Abr., Release. But payment or satisfaction of a debt is a different thing. As a general rule, a debt existing in parol, whether by writing or otherwise, is not

extinguished by security which is of no higher nature; for instance, a book account would not of necessity be extinguished by the promissory note even of the debtor, unless by express agreement, if it be so accepted by the creditor: 1 Salk. 124;¹ 7 T. R. 60;² 3 Johns. Cas. 71;³ 5 Johns. 68;⁴ 8 Id. 304.⁵ But it is surely competent for the creditor to accept of whatsoever he will, in discharge or satisfaction of a debt. If he may accept the promissory note of the debtor, he may also accept that of a stranger. And if he may accept the note of a stranger, he may also accept his promise without writing. The validity of the substitute, the note or promise, depends on the express agreement to discharge the original debt. And to this point the authority of *Roe v. Hough* is express. It was agreed between A., B., and C., that C. should pay A.'s debt to B., and that B. should discharge A.; that B. should accept C. in the place of A., as his debtor; and it was held that A. was thereby discharged, and C. bound. A like case is put by Mr. Justice Buller, in *Talbot v. Harris*, 3 T. R. 174. Suppose A. owes B. one hundred pounds, and B. owes C. one hundred pounds, and it is agreed between them, that A. should pay C. the one hundred pounds, B.'s debt is extinguished, and C. may recover that sum against A. See also, *Israel v. Douglas*, 1 St. B. 239.⁶ In these cases the validity of the new promise, and the discharge of the original debt, are mutually dependent; they arise at the same time, and result from the agreement of the parties, that the existing debt shall be extinguished, and the first debtor discharged, in consideration of the new undertaking. There is no form of words or writing necessary to give effect to these mutual undertakings. If the promise to pay is binding, the agreement to discharge is equally so; each is binding because the other is.

But in the case at bar, there is something more than a mere verbal agreement, if more be necessary. The plaintiff, it is true, has not given a receipt, or other written discharge, to the former debtor. But he has entered satisfaction in writing on the books, which constituted the evidence of his demand; and has declared by such entry, that he has no further claim upon Mrs. Pellott, in whose stead he has accepted the defendant as his debtor. And although he can not be said to have canceled the books, the entry furnishes written evidence of his agree-

1. *Clark v. Mendall*.

2. *Miscited*.

3. *Herring v. Sanger*.

4. *Tobey v. Barber*; 8 C., 4 Am. Dec. 326.

5. *Phelps v. Johnson*, 8 Johns. 79, is probably intended.

6. 1 H. Bl. 230.

ment to discharge Mrs. Pellott, in consideration of the defendant's promise. Such agreement, whether proved by writing or parol, was an effectual legal discharge; and after this agreement, the plaintiff could not have recovered, on the original demand from her. This differs from the case of the *Assignees of Sweet v. James Chadley*, 3 Barn. & Cress. 591, in an important particular, although in some of their features the cases are identical, and the ground of the decision in that case will illustrate the proposition advanced. James Chadley was indebted to Sweet for goods sold to the amount of fourteen pounds one shilling. Robert Chadley was also indebted to Sweet and to James Chadley; Robert directed Sweet to put down the goods, for which James was indebted, to the account of him, Robert, and then informed James of this arrangement. Afterwards Sweet rendered his account to Robert, with this entry at the foot: "December 1, 1822—To your brother's account, fourteen pounds one shilling." This was all that passed. The assignees brought suit against James Chadley, on the original demand. After verdict for plaintiffs, on a rule for nonsuit, in the king's bench, Abbott, C. J., in discharging the rule, said: "Sweet is not proved ever to have said, 'I will take you, Robert, as my debtor, and discharge James;' he is not proved ever to have said or done that, which would have the effect of discharging James. It is contended, by the defendant's counsel, that this is accord and satisfaction. But admitting the previous agreement, where is the satisfaction? I consider the entry made by Sweet to mean no more than this: 'I will debit the account of Robert for fourteen pounds one shilling, not that I will discharge James, at all events, from this sum.'" The case of *Waggoner v. Gray's Administrators*, 2 Hen. & M. 603, 611, will be found to present a similar question, decided on the same principles.

This court is of opinion, that there was not error in the charge of the judge below, and the motion is refused.

DE SAUSSURE, JOHNSON, GANTT, O'NEALL, JOHNSTON, BUTLER, and RICHARDSON, concurred.

PROMISE TO PAY DEBT OF ANOTHER: See *Mattheus v. Milton*, 26 Am. Dec. 247, and note 249, where the other cases in this series are collected

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THOMPSON v. BANK OF SOUTH CAROLINA.

[3 HILL LAW, 77; S. C., 1 RILEY LAW, 81.]

LAST INDORSER OF A PROMISSORY NOTE, who leaves it with a bank for collection, is himself the depositor, and the bank is responsible to him for the performance of its duty to make the collection.

BENEFIT DERIVED BY A BANK FROM THE USE OF MONEY collected on a note is a sufficient consideration to support its undertaking to collect it.

BANK WHICH TAKES NOTE FOR COLLECTION is bound to demand payment of the maker, and to cause notice to be given to all the indorsers, and is liable for all loss occasioned by its neglect to do so.

BANK IS LIABLE FOR OMISSIONS OR MISTAKES OF NOTARY PUBLIC to whom, as its agent, it has intrusted a note left with it for collection.

WHETHER PARTY HAS USED DUE DILIGENCE to charge indorser of note is a question of fact for the jury; but what constitutes sufficient notice of dishonor is a question of law.

ACTION against the defendant for omission to give notice to the indorsers of a promissory note. There was a verdict for the plaintiff, and the defendant appeals, and moves for a new trial. The other facts sufficiently appear from the opinion.

Smith, attorney-general, for the motion.

Petigru, contra.

By Court, **EARLE, J.** The plaintiff deposited a note, by the hands of Mr. Shannon, resident in Camden, in the branch bank at that place, for collection. One Goodman, also resident there, was the maker. Black, the payee, had indorsed it to the plaintiff, who also indorsed it, when he sent it to the bank. He was the last indorser and owner. At maturity, the note being unpaid, the president called at Shannon's, who was absent from home, and the note was protested for non-payment by the bank notary; but no notice was given to the indorser, Black, or to the plaintiff, "they not being residents of Camden, and having no agent there." This action is brought by the plaintiff for the non-performance of its undertaking by the bank, to collect the note for the plaintiff, and on non-payment, to give the necessary notice to charge the indorser, it being alleged, that for want of such notice, the indorser is discharged, and the plaintiff has lost his debt.

On the argument in this court, I was inclined to think this action would not lie for the plaintiff against the bank, until he had failed in his suit against the indorser. But the other members of the court being of a different opinion, and no question being raised on that ground by the counsel for the bank,

the case will be considered and disposed of without reference to it.

The exception mainly urged against the verdict is, that the bank was the agent of Shannon, the depositor, only, and not of the plaintiff; that the bank having given notice of non-payment to him, performed all that it engaged to perform, and was not bound to give notice to the indorser or owner. It will, in the first place, be proper to inquire who was the depositor. The protest, which is competent evidence as an admission against the bank, although not evidence for the bank, of the facts stated in it, expressly recognizes the plaintiff as the depositor and owner of the note; "at the request of the president and directors of the branch of the bank of the state of South Carolina, at Camden, for William Thompson, I, Robert Mickle," etc. The plaintiff was the last indorser, and, of course, the money, when received, if paid at all, would have been placed as a deposit to his credit, and he alone could have withdrawn the fund. These circumstances show that in fact the plaintiff was himself the depositor; and that the bank regarded him as the owner, and undertook the collection of the note as his agent. The bank was, therefore, responsible to him for the performance of this duty or engagement.

The extent of that engagement and the manner in which it was to be performed, next become the subject of inquiry. And as these much depend on the benefit to be derived by the promisor, or the injury to be sustained by the other contracting party, it is material to inquire whether there was any such consideration for this undertaking on the part of the bank. And it could not but excite some surprise, at this day, if it were seriously alleged that a bank had undertaken to do any act of this kind, from which it did not expect to derive a benefit; to collect and appropriate any sum of money for a customer, on which it expected no commission, and no use equivalent to a commission. The readiness with which banks engage in this business, is a proof that they do derive a benefit from it; and the benefit is proportioned to the extent of it. The moneys received on notes lodged for collection, become a deposit, on which, as a portion of their active capital, banks derive an income, as it enables them to extend their issues; and it is well known that deposits are always considered by the banks as a portion of their available means to meet emergencies. In a commercial community, where such deposits are numerous and extensive, they form an important item in the business transactions of banks, from which

large sums are frequently accumulated; and which may reasonably be expected to remain there, as a place of safety, until some exigency may require them to be withdrawn; and which may, therefore, prudently be relied on as a permanent source of revenue. I apprehend, therefore, it will not be denied that such deposits in general, are highly beneficial to a bank; and that for the purpose of this action, is enough. The money was not received on this note; no benefit was actually derived. But this was only one out of many; it was one small item in an extensive branch of business, from which the bank did derive a benefit; and it was the anticipation of that benefit which induced the bank to undertake the collection. And this forms, in the opinion of the court, a sufficient consideration: *Smedes v. The Bank of Utica*, 20 Johns. 372; where several of the questions involved in this case are ably discussed, and decided as they are now by this court.

What, then, was the extent of the engagement? The bank received the note as indorsee, to entitle it to demand the money. The plaintiff, had he retained the note, it may be assumed, would have known what was necessary to charge the indorser, and would not have neglected it. The defendant, for valuable consideration, took the note out of his hands, in the character of indorsee, for the purpose of collection; not merely for the purpose of demanding payment of the maker, at maturity; for Black, the indorser, was liable, in default of the maker; and if he had received notice, may have paid it. We are to presume that he would have paid it, in consideration of his legal liability, and out of regard to his credit. When the note was deposited for collection, it was for the purpose of being collected from all who were liable upon it; and to omit giving notice of the dishonor to the indorser, was neglecting a part of the obvious and legal means of collection. The understanding and usage of banks, everywhere, are conformable to this view of the subject. I consider, therefore, that where a bank takes a note for collection, it is bound to demand payment of the maker, and to cause notice of non-payment to be given to all the indorsers, as on a note discounted.

It is next to be considered, whether the bank is excused, by the circumstances relied on, from its liability for this default. And first, of that ground of defense which supposes the bank excused, because it employed a notary, "who is a public officer, and the bank is therefore not responsible for his ignorance or laches, unless his incapacity were notorious." To what extent

this ground might avail the defendant, if the subject of the controversy were a foreign bill of exchange, on which protest is necessary, will not now be considered, much less decided. The question here arises on a promissory note; protest for non-payment is not necessary; it is altogether superfluous; a demand for payment was necessary; and to enable it to be proved, it was necessary to employ some one to make it; but a notary was not requisite; any other individual would have sufficed to make the demand or to make the inquiries necessary to giving notice. Supposing the notary employed here for that purpose, which is not clear, he can not be regarded as acting officially, and must be regarded as the mere agent of the bank, for whose omissions or mistakes the bank is liable.

As I have intimated, however, it is not clear that there was any omission on the part of the notary, for it seems that the demand of payment, if made at all, was made before the note was placed in the hands of the notary; as also were the inquiries at the residence of Shannon, by the president, Salmond, who inquired of McGee, his clerk, where the indorsers lived; and as he could give no information, "the note was delivered to the bank notary, who protested it for non-payment, but no notice was given to the indorsers, they not being residents of Camden, and having no agent there." Such is the language of the report (I presume the evidence of Shannon himself), and such is the language of the protest, which, as before remarked, is an admission of the notary, or bank agent, and therefore evidence against the bank. It is therefore not clear, whether the reason assigned for the protest, is to be attributed to the president, or to the notary. The president made the inquiries at Shannon's, and receiving no information concerning the indorsers, gave the note to the notary, who protested it, without further inquiry concerning their residence, although Goodman, the maker, resided in the town, and the bank knew that Thompson, the plaintiff, was the owner of the note. If the reason assigned in the protest, be the ground assumed by the notary, as the agent of the bank, that of itself would furnish sufficient evidence of his ignorance and incapacity to charge the bank. But supposing otherwise, and that the president and notary made inquiry of McGee concerning the indorsers, we are brought to the next ground of defense, that the bank by making the inquiry of the immediate depositor, used due diligence, and is not liable further.

Suppose an action brought on the note by the bank as in-

dorsee, against the plaintiff as indorser, and the facts now relied on to excuse the bank, were relied on to dispense with notice, to wit: that the bank, on non-payment, had made application at the house of an intermediate indorser, or even of a person employed to negotiate the last indorsement, and by whose agency it had been passed to the bank. I think it could not be held sufficient to dispense with notice. What constitutes sufficient notice of the dishonor of a note or bill, is in general a question of law; and yet, what shall be deemed reasonable diligence in ascertaining the residence of an indorser, in order to give notice, is a question of fact for the jury. The rules in relation to notice are very well settled, and generally understood. They are well stated by Mr. Justice Washington, in *Williams v. The Bank of the United States*, 2 Pet. 96: "The holder of a bill or promissory note, in order to entitle himself to call upon a drawer or indorser, must give notice of its dishonor to the person whom he means to charge. But if, when the notice shall be given, the party entitled to it be absent from the state, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence, used by the holder, can enable him to discover, the law dispenses with the necessity of giving regular notice." And in *Bateman v. Joseph*, 12 East, 432, it was held, that whether a party used such reasonable diligence, to ascertain the residence of an indorser, was a question of fact to be left to the jury. That was an action by a subsequent indorsee against the drawee and first indorser of a bill of exchange, which became due on the twenty-seventh September, when it was presented for payment, to the acceptor in London, and dishonored. Notice of the dishonor reached Manchester, where the plaintiff lived, on the thirtieth September, early enough to give notice to the defendant on that day, by the post from Manchester to Liverpool, where the defendant lived, and the plaintiff had like opportunities of giving notice on the first, second, and third of October, but none was given until the fourth, when the defendant received it in a letter from the plaintiff, directed to Liverpool. At the trial, before Lord Ellenborough, this apparent laches of the plaintiff was accounted for by the evidence of his servant, that his master did not know the residence of the defendant, until the day when the notice was sent by the post. And his lordship left it to the jury to say whether the plaintiff had used due diligence, in acquiring the knowledge of the defendant's place of residence, admitting that otherwise the notice was too late. The jury having found a

verdict for the plaintiff, on a motion for a new trial, it was agreed by all the court that it was a question proper to be left to the jury, and they had decided it. "Whether due notice has been given of the dishonor of a bill, all the circumstances necessary for the giving of such notice being known, is a question of law; but whether the holder has used due diligence to discover the place of residence of the person to whom the notice is to be given, is a question of fact for the jury."

If we consider the question as one between principal and agent, and discuss the degree of diligence, in reference to the duty undertaken to be performed, we shall come to the same conclusion, that it was one very proper for the decision of the jury. Whosoever undertakes an agency, engages likewise to employ an adequate degree of skill, and to use a reasonable degree of diligence. In this case, the bank engaged for the exercise of so much skill, in the particular department of business, as to perform the duty of collecting the note, and, as I have endeavored to show, of doing whatever was necessary to charge those to whom the plaintiff might resort for payment; and in accomplishing this, that it would omit nothing which reasonable diligence would enable it to perform. If it be said that it was the fault of the plaintiff, that the bank was not informed of the residence of the indorsers, it may be replied, that the bank must have known, when it took the note for collection, that a notice of dishonor might become necessary; and if the residence of the indorser was unknown, as the information was indispensable, to enable the bank to perform the duty, it was equally the duty of the bank to seek for and obtain it, at the time of receiving the note. And supposing both to be in fault, at the time of the dishonor of the note, it was surely incumbent on the bank to use all the means then in its power, to ascertain the residence of the indorser. It was submitted to the jury whether the bank had used reasonable diligence, in seeking that information, and the jury have decided against the bank, and a majority of the court thinks with good reason. The plaintiff was known as the owner, yet the note was taken from Shannon, without inquiry concerning him, or the previous indorser. And after non-payment, no inquiry was made of Goodman, the maker, and but one attempt to inquire of Shannon, although both lived in the same town.

A majority of the court concurs entirely with the presiding judge, in his charge to the jury, and in all that is stated in his report, except when he thinks the bank did all it was bound to

do; and when he doubts whether he should not have so charged the jury, as matter of law. He did well in leaving it to the jury. And the motion to set aside their verdict is refused.

BUTLER, DE SAUSSURE, O'NEALL, and RICHARDSON, CC. and JJ., concurred.

DUE DILIGENCE IN ASCERTAINING INDORSEER'S RESIDENCE is a question of fact for the jury: *Nichol v. Bate*, 27 Am. Dec. 505.

QUESTION OF REASONABLE DILIGENCE is a mixed question of law and of fact, to be decided by the jury, under the direction of the court, upon a general verdict, or to be decided by the court, where all the facts and special circumstances of the case are found by a special verdict: *Mohawk Bank v. Broderrick*, 27 Am. Dec. 192, note 197. See also note to *Aymar v. Beers*, 17 Id. 548.

WHAT IS REASONABLE DEMAND AND NOTICE is purely a question of law where the facts are found: *Nash v. Harrington*, 16 Am. Dec. 672; *Hadduck v. Murray*, 8 Id. 43.

BANK NEGLECTING TO MAKE DEMAND IS RESPONSIBLE TO PAYEE: See *Durnford v. Patterson*, 12 Am. Dec. 514, note 516.

AGENT FOR COLLECTION BOUND TO GIVE NOTICE OF NON-PAYMENT: See *Tunno v. Laque*, 1 Am. Dec. 141.

DAVIS v. ARLEDGE.

[3 HILL LAW, 170.]

BOOKS OF ACCOUNT OF A MERCHANT ARE NOT LIABLE TO SEIZURE as a distress for rent, for they come within the spirit of the law which exempts the utensils of an artisan, or the books of a scholar; and, besides, being mere choses in action, they are not liable to distress for rent.

PROMISE TO INDEMNIFY against the doing of an act is void, when the act was, at the time, known to be a trespass; but if it was not known to be illegal, the promise to indemnify is valid.

MOTION for a nonsuit. The opinion states the case.

Clark and McDowell, for the motion.

Pearson, *contra*.

By Court, EARLE, J. The question presented for the consideration of this court, arises on the motion for a nonsuit; and the ground assumed on behalf of the defendant, is, that the plaintiff is not entitled to recover, because the act undertaken to be performed by the plaintiff was against law, and therefore, that the undertaking of the defendant's testator to indemnify the plaintiff against the consequences of the act, being founded on an illegal consideration, was *nudum pactum* and void. The plaintiff, in the transaction out of which the contract to indemnify arose, acted as the bailiff and servant of the defendant's intestate.

At the instance of the latter, he levied a distress warrant on the books of account of Adams, the tenant, and placed them in the hands of the landlord, who retained them in his possession to the damage of Adams, without pretending to proceed according to the acts regulating distresses for rent. For this irregularity, both in the levy and in the subsequent proceedings, Adams brought his separate actions against Davis, the bailiff, and Arledge, the landlord. There was a recovery against Davis, and he now seeks to enforce his remedy on the undertaking to indemnify. This is resisted, on the ground that he undertook what was unlawful, and no action can arise out of such an agreement.

The general principle is not to be disputed, that a contract or agreement which is founded on illegal consideration, which requires the performance of any act which is criminal in-itself, or *contra bonos mores*, is void, and can not be enforced. Was the act of the plaintiff, in distraining the books of account of the tenant, of such a character? We think it was not. It may be conceded that in point of strict law, the books of account were not liable to seizure as a distress, without impairing the right of the plaintiff to recover. A majority of the court is of opinion that the books were not liable to seizure. And as this proposition was somewhat controverted at the argument, it may not be amiss to set forth the ground of this determination.

All personal chattels are liable to distress, unless they fall within some of the exemptions allowed. And books of account do fall, perhaps, within the strict technical meaning of personal chattels. Yet it is held, that "no man can be distrained for rent, by the utensils of his trade, as the ax of the carpenter, the books of the scholar, the materials for making cloth in a weaver's shop; for there the law protects, under a presumption that without them the tenant could neither be useful to others, nor gain a livelihood for himself:" *Bac. Abr., tit. Distress*; and cites *Co. Lit. 47*, who fully sustains the proposition. The books of account of a merchant, trader, or shop-keeper, come within the scope and spirit, within the reasons, if not the letter, of this exemption. They are indispensable to the prosecution of his business, as his implements of trade, without which he could not only not collect his dues, but would be subjected to the hazard of heavy losses, by being deprived of the means of prosecuting suits for the recovery of them. But there is a more conclusive reason why they are not liable to seizure. However, in the origin of the common law remedy of distress, it was con-

sidered only in the light of a pledge, for the ultimate security of the rent in arrear, or rather for the performance of the feudal services, it has long since ceased to be regarded in that light, and it is now become, by numerous statutes, merely a summary mode of enforcing the payment of rent, by sale of the tenant's effects. Now, books of account are not susceptible of this process. There is no provision in any known statute, by which they can be appraised, sold, or assigned to the landlord. And indeed, they are not goods and chattels, in the ordinary sense of the word; but merely evidences of debt, choses in action, which we think have never been held liable to distress for rent, any more than to be taken in execution.

The plaintiff, it is urged, was a lawful constable, a sworn officer of the law, bound to know his duty; and in distraining the books he violated his duty, and is not entitled to the benefit of the indemnity. I do not perceive that there is any difference in principle, admitting the premises, between this and the common case of indemnifying a sheriff for taking goods under execution. If the sheriff, under an execution against A., take the goods of B., it is an unlawful act; a trespass for which he is liable. But if the plaintiff in execution point out the goods as belonging to A., and direct the levy, and promise to indemnify the sheriff, it is good. Such was the case of *Arundel v. Gardner*, Cro. Car. 652. So here the landlord pointed out the books, and directed them to be seized, and after their seizure, took them into his own possession, promising to save the bailiff harmless. Indeed, it may well be questioned, whether the bailiff did stand in the relation of a public officer. I shall not discuss the question, whether any other than a constable may make distress. It is clear that he is not obliged to obey the mandate of the landlord. And I think he is rather to be regarded as the agent of the landlord than a public officer. And in this point of view, I think it can not be doubted, that if he obeyed the instructions of the landlord in making the levy, on his promise to indemnify, he must recover. And to this point is the case of *Allan v. Onland*,¹ 2 Johns. Cas. in Err. 52, where the plaintiff was the servant of the defendant, and at his command, under a promise to indemnify him, had entered the *locus in quo*, which the defendant declared to be his own, but which turned out to be the close of another, who recovered in trespass against the plaintiff. And it was held, that the promise of the defendant to save harmless, was founded on good considera-

1. *Allare v. Onland*.

tion, and the plaintiff was allowed to recover against him. It is even held, that if one request another to enter B.'s land, and in his name, to drive out the beasts, and impound them, and promise to save harmless, this is a good assumpsit, although the act is tortious: *Hutton v. Winch*, Win. 49, cited in Com. on Con. 31. Such also was the case of the innkeeper who detained in custody, as a prisoner, for one night, one B., whom the defendant alleged he had arrested on a commission of rebellion, on the promise of the latter to save him harmless, which was held good: 1 Vin. Abr. 299; P. L. 27.

Each of these cases could only have proceeded on the ground that the person employed was misled by some misrepresentation of the person making the request, which disguised or concealed the unlawfulness of the act. For I apprehend no agreement to indemnify would avail a person, whether acting officially or otherwise, in doing what he knew to be an unlawful act. And the case of *Blacket v. Crissop* is an illustration of this principle. That was debt on the bond of the defendant to appear and prosecute, etc., and to save harmless the plaintiff, who was sheriff. And the case turned on the question, whether by the statute the sheriff had authority to take such bond. And it was held that he had. And by Powell, J., that where the sheriff takes a bond or promise, to keep him harmless, in the doing of a lawful act, the bond or promise is good; but if it be in the doing of that which he ought not to do, the bond or promise is void, and against law. The general principle is well stated by Lord Mansfield, in *Holman v. Johnson*, Cowp. 341: "The principle of public policy is this, *ex dolo malo, non oritur actio*. No court will lend its aid to a man, who founds his action upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of the country, then the court says he has no right to be assisted." Is the act performed here by the plaintiff of that description? It is certainly not *malum in se*, nor is it a transgression of a positive statutory enactment. As to its morality, it is indifferent; and as to its legality, it may well be supposed the plaintiff was not informed. On a careful review of all the cases, I am disposed to come to the conclusion expressed by Chief Justice Spencer, in *Coventry v. Barton*, 17 Johns. 162 [8 Am. Dec. 376]. The defendant was overseer of the highways, and the plaintiff was assessed to work in his district, and under his direction. In obedience to his orders, and under his promise that he

would see them out, or indemnify them, the plaintiff and others pulled down a turnpike gate that stood across the way; for which suits were brought, and recoveries had, against those who removed the gate, and among them against the plaintiff. In an action by the plaintiff against the defendant, on the promise to indemnify, the chief justice remarks: "I have no hesitation in saying, it is a true and just distinction between promises of indemnity which are and those which are not void, that if the act directed or agreed to be done, is known at the time to be a trespass, an express promise to indemnify would be illegal and void. But if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise." Considering the subordinate capacity in which the plaintiff acted, as the mere agent or servant of the defendant, whose warrant he was executing under his own personal superintendence, obeying his directions, and placing the articles in his hands, I think he has shown enough to satisfy us, that he was not aware he was doing wrong; and that the defendant ought to bear the consequences of the act.

The motion is dismissed.

HARPER, JOHNSTON, DE SAUSSURE, RICHARDSON, BUTLER, O'NEALL, and EVANS, CC. and JJ., concurred.

EXEMPTIONS FROM DISTRESS: See *Hoskins v. Paul*, 17 Am. Dec. 455, note 458.

PROMISE TO INDEMNIFY, WHEN VOID, AND WHEN VALID: See *Cocentry v. Barton*, 8 Am. Dec. 376, note 378.

MEACHER v. FORT.

[3 HILL LAW, 227; S. C., 1 RILEY LAW, 248.]

PROOF OF INDORSEMENT OF PROMISSORY NOTE IS NOT NECESSARY, in an action by a *bona fide* holder against the maker who draws such note payable to a real person, forges his indorsement, and puts it in circulation; such maker will be estopped from denying its genuineness.

ACTION on a promissory note. The note was payable to John Fort and Joseph Maybank and indorsed to the plaintiff. The defendant, John E. Fort, was the maker about whose signature and that of Maybank, one of the indorsers, there was no doubt. The defense relied on was that the signature of John Fort, one of the indorsers, was a forgery, and that as the note was made payable to him and Maybank, the plaintiff could not recover

unless both indorsed it. It was clearly proved that the signature was not John Fort's, and he swore that he had not authorized any one to sign his name on the note. A bond signed by John E. Fort and John Fort was introduced in evidence to enable the jury to decide whose writing the signature of John Fort was. Meacher made demand for payment upon the maker. The plaintiff was a *bona fide* holder, having received the note in the course of a regular business transaction. The judge charged the jury that, as a general rule, to enable the plaintiff to recover against the maker it was necessary to prove that the payees of the note had parted with their interest by indorsement, but that the exceptions to this rule, applicable to this case, were: 1. Where the maker of a note makes it payable to a fictitious person, whose name he writes on the note, and then puts it in circulation; 2. Where he makes it payable to a real person, forges his indorsement, or procures it to be forged, and then puts it in circulation. In these cases the drawer could not insist on proof of the indorsements, because he was estopped to say that that was not genuine which he had represented to be so by putting it in circulation. It was submitted to the jury to decide whether the evidence in the case brought it within these exceptions, and they found for the plaintiff. Defendant appeals, and moves for a nonsuit or a new trial.

Thompson, for the motion.

Petigru, contra.

By Court, EVANS, J. This court is of opinion there was no error in the charge of the presiding judge. The facts of the case were for the decision of the jury, and there do not appear to be any sufficient grounds to disturb the verdict.

The motion is dismissed.

GANTT, RICHARDSON, O'NEALL, and BUTLER, JJ., concurred.

Cited in *Hortman v. Henshaw*, 11 How. (U. S.) 184, to the point, that the acceptor is liable, where the names of the drawees or payees were fictitious and the indorsement was written by the maker, although, as the payees were fictitious persons, their handwriting could not be proved; and in *York Bank v. Asbury*, 1 Biss. 233, to the point that if the maker of a note makes it payable to a fictitious person and puts it in circulation, with the fictitious name written on it; or if he makes it payable to a real person and forges the indorsement, or procures it to be forged, and then puts it in circulation, he is estopped from saying that it is not genuine.

McKENNA v. HAMMOND.

[3 HILL LAW, 231.]

RUNNING GEAR OF A COTTON-GIN IS A FIXTURE, attached to the freehold, which the administrator has no right to sell.

TROVER for the running gear of a cotton-gin. The opinion states the case.

By Court, EVANS, J. The only question in this case was, whether the running gear, the subject of this action, was a fixture appurtenant to the freehold. If it was, then the administrator had no right to sell it, and it passed with the freehold to the defendant. This question, I think, is fully settled by the case of *Nimmons v. Moye*, decided in December, 1829, in Columbia. As that case is not reported, I will state the facts as contained in the brief. "Wm. Nimmons, the plaintiff, purchased from George Dunbar, administrator of the estate of Henry Y. Patrick, deceased, the running gear of a cotton-gin, belonging to the estate of Patrick, in January or February, 1828, and was told he might take it into possession as soon as he pleased. The running gear was attached and fastened, as running gear usually is, to the gin-house, on one of the plantations of the deceased, and yet remains in that situation. The plaintiff says it was not convenient for him to take away the gear at that time, and in March, 1828, the commissioner in equity, by an order of the court, sold the land upon which the gin-house stands, with the appurtenances to the same belonging, at public sale, and Allen Moye, the defendant, became the purchaser, and received commissioner's titles. The defendant, previous to the sale of the land, received no notice that the gear had been sold by the administrator, and upon the purchase of the land, he went into possession under the commissioner's title, the running gear of the gin being still attached to the house as aforesaid."

On the hearing of this case in the appeal court, all the judges were of opinion, that the running gear was a fixture attached to the freehold, and therefore the plaintiff could derive no title from the administrator.

The principle upon which that case was decided, is, that whatsoever is erected upon land as a means of enjoying it, is a fixture; but whatever is intended for the purpose of carrying on a trade which has no necessary connection with the use of the land, is a mere chattel, and belongs to the administrator.

And it was on the authority of the reasons of this case, that it was held in *Fairis v. Walker*, 1 Bail. 540, that a cotton-gin was a fixture, and passed with the freehold.

I do not perceive any legal distinction between these cases and the one under consideration. In all essential particulars they are the same. The fact that Hammond knew of the sale to McKenna, if admitted, can not vary the case, if the administrator from whom the plaintiff bought has no title.

The motion is dismissed.

GANTT, RICHARDSON, EARLE, and BUTLER, JJ., concurred.

FIXTURES, WHAT ARE, AND WHAT ARE NOT: See *Russell v. Richards*, 25 Am. Dec. 254, note 257; *Taffe v. Warnick*, 23 Id. 333, note 386; *Tobias v. Francis*, Id. 217, note 219; *Swift v. Thompson*, 21 Id. 713, note 732; *Goddard v. Bolster*, 20 Id. 320, note 322; *Farrar v. Stackpole*, 19 Id. 201, note 205; *Gray v. Holdship*, 17 Id. 680, note 686, where the subject is discussed at length.

CASES IN CHANCERY
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

NIOLON v. DOUGLAS.

[2 HILL CH. 443.]

DEBTOR MAY LAWFULLY ASSIGN HIS WHOLE ESTATE for the benefit of such of his creditors as will release him.

ASSIGNMENT FOR BENEFIT OF CREDITORS CAN NOT RESERVE TO THE ASSIGNOR CONTROL over any part of his assets, in such a manner as to enable him, at his pleasure, to make or withhold payment, according as his creditors shall submit to or reject the terms dictated by him.

DEBTOR MAY LAWFULLY PREFER one creditor over another.

BILL filed to have a deed of assignment set aside as fraudulent and void. Ralph Johnson executed an assignment of his whole estate, real and personal, to certain persons, in trust to sell the same, and pay therefrom: 1. All existing judgments against him. 2. The costs of the execution of the assignment. 3. Out of the remainder, in ratable and equal proportions, all such creditors of the said Ralph Johnson, as shall render to said assignees and establish their demands within six months from the date of the deed, and who shall, at the time of establishing said demands, signify and accept in writing, that the dividend so to be received shall be a free discharge of their said claims. And the deed further provided, that upon the payment of the dividend, the creditors assenting should grant a final release. It also debarred and excluded from any advantage or benefit under the assignment all those creditors of Johnson who neglected or refused to render or establish their demands, and signify their assent to accept the dividend as a full and final discharge of their claim. The assignees accepted

the trust, and undertook its execution. They sold the property after the prior executions were satisfied, and have now the proceeds to be paid over to the creditors who have accepted the terms of the assignment. Subsequently to the execution of the assignment the plaintiff obtained and entered up judgment against Johnson, and refused to accept under the deed. He alleges that the deed is void in law, claims that the moneys in the hands of the assignees are liable to be paid under his executions, and prays that the assignees may be ordered to pay over such moneys to satisfy the executions according to priority. The answers admit the facts stated in the bill, but allege that the assignment is valid in law and equity; that the deed was not intended to hinder, defraud, or delay creditors, but to place all the creditors of the assignor on an equal footing.

Wethers and Desaussure, for the plaintiff.

McWillie, for the defendants.

JOHNSTON, Chancellor. The authorities cited at the hearing of *Vaughan v. Evans*, 1 Hill Ch. 414, certainly left on my mind a strong impression that the mere requiring of a release from accepting creditors, would invalidate the assignment of an insolvent debtor. Under the influence of that impression, I put the defendant's counsel to open the argument of this case. The result of a careful consideration of all that was advanced on both sides, is a thorough conviction that such a position is unfounded, either on principle or decided cases.

I am happy to find, on a recurrence to *Vaughan v. Evans*, that as the court was not called upon to express, so it did not express, an opinion as to the soundness of the position I have mentioned. As I shall have occasion to advert, hereafter, to the authorities referred to in that case, I shall take that opportunity to show that neither those authorities nor that case establish the doctrine in question. Whatever doubts may have been entertained or expressed, respecting the morality or the policy of permitting a failing debtor to prefer some of his creditors over others, his legal right to do so is too well settled to admit of discussion.

Chancellor Kent, while he expressed the strongest repugnance to the exercise of such a power by the debtor, was compelled to admit its legality: and our own supreme court was constrained by the force of authorities to adopt a similar conclusion: 2 Johns. Ch. 283, 578;¹ 1 McCord Ch. 441, 442.²

1. *Biggs v. Murray*.

2. *Moffat v. McDowell*.

There is undoubtedly great force in the objections brought against this power to prefer. But a contrary judgment has, for a great length of time, and very uniformly, been practically pronounced by those most deeply interested; and who must, therefore, be taken to have attentively considered the subject, in all its bearings upon the actual concerns of life.

When we turn to the jurisprudence of England, we find that that people has never deemed it prudent or practicable to lay sweeping restrictions upon preferences, except in cases of traders. For them the legislature has provided a specific statutory code: but in cases not falling within it, a much wider range of preference has ever been allowed by the courts, than in most of these states; yet nothing has come from parliament to show that it regarded these judicial decisions as subversive of true policy. Indeed, the very fact that their bankrupt laws have been confined to traders, shows that in their estimation they are unsuited to the mass engaged in the other avocations of life: else, why draw the distinction?

Two things seem essential to a bankrupt system. First, that the subjects of it should be such as from the nature of their business and the habits incidental to successful prosecution, have it in their power to be informed, and are generally informed, when insolvency has supervened. This information gives them warning when to stop. It shows them precisely when that crisis has occurred, after which any business operation done by them, if allowed to stand, must affect a preference of some one creditor at the expense of some other; and therefore their engaging in such operation, having such information, demonstrates that they intended to give a preference. It is not with them as it is with others, who, not having the means of being constantly informed of their exact situation, or the habits leading them to a constant comparison of their effects with their debts, may ignorantly and *bona fide* do an act, in the prosecution of their ordinary business, which may result in a preference among their creditors. With regard to the mass of the community, this difficulty occurs, therefore, which does not exist as respects traders. You must allow them to give preferences, and that willfully, or you must put an end to all their dealings; for if allowed to deal at all, preferences will result, and it will be impossible to separate those which are designed, from those which are not. If you could pronounce, as in the case of traders, that all preferences given by them must probably have been given willfully, you might set your face against them all;

but this you can not do. See the difficulty. Will you declare that no debtor shall confess a judgment, or give a bond or a mortgage? If he is allowed to do so, a preference may result. But if you prohibit him, every debtor must (at the peril of costs which must fall on him, or, if insolvent, on the mass of his creditors) stand suit, and obstinately and dishonestly defend himself against any just demand. Again, will you require any plain man, when payment is demanded, to stand still and enter into a calculation how much he is worth, and how much he owes, before he can venture to pull out the money he has in his pocket and make payment? If he is not prohibited from paying, it may turn out that from his reserved property proving insufficient, a preference has been given. In short, can you, as to the mass of men, prevent preferences, without putting verbal and written, parol and special contracts, all on a footing; and then attaching a lien (and the same lien) to all; or abolishing all liens? If you do this, you stop all commerce. As long as the law recognizes a distinction between sealed and unsealed instruments; between bonds, mortgages, and judgments, and between the liens of judgments and executions, preferences are inevitable. The very execution of the instrument may raise the preference.

The second thing essential to a bankrupt system, seems to be, that those to whom it is to be applied shall form a distinct class, engaged in well-defined and unmixed pursuits. Even in England, where avocations have a distinctness as yet utterly unknown to us, much confusion exists in the application of their system, and much injustice arises from its enforcement, owing to the intricate relation which must exist between its subjects and all other portions of the community. But here, where as yet men are in the daily habit of changing their pursuits, and where in fact almost every man is engaged in a variety of avocations at the same time; where there is no such thing as a regular division of labor or employments, and where, from the intricacy and variety of the relations of citizen to citizen, no provision of law can be applied to any one without greatly affecting others, it is very doubtful whether anything like a bankrupt system is suited to our condition; or whether any restrictions other than those which experience has shown to be expedient for the mass of men, can be adopted. What says experience on this subject? The federal government, after testing the expediency of a bankrupt system by experience, suffered it to expire, and has not renewed it. And although

each state has the right, when no such system is in exercise by the federal government, to institute one for itself, it is believed not a single state has at any time, by statute, forbidden all preference among creditors. The insolvent laws of most of the states either allow the debtor to draw a distinction among his creditors, in the very act of surrendering under the law itself, or sustain it if already done. So much for the legislatures. With regard to the opinion of the judiciary, it is remarkable, that in those states where the courts set out with a simple allowance of preferences, no change has been found necessary; while in those in which they attempted to put them down by straining after exceptions to the acknowledged law, they have found it impracticable to carry out their decisions to a system; and many of them have either vacillated or been compelled, more or less, to retrace their steps.

Surely there is something in all this calculated to raise a doubt whether there is not some fallacy somewhere, in that reasoning which indiscriminately condemns all preferences. Surely, when we see such a long and uniform toleration of the reprobated practice, we must set it down either to the genius of our people, or to a settled conviction in those most conversant with the subject, that if it produces injustice, it is such injustice as human laws can not remove, unless, indeed, at the hazard of greater evils; and thus we shall be brought the more cheerfully to acquiesce in what our own judgments, or our own feelings, may not in all respects approve.

Chancellor Kent states his objection to preferences among creditors with his accustomed force.¹ "Experience," says he, "shows that preference is sometimes given to the very creditor who is the least entitled to it, because he lent the debtor a delusive credit; and that too, no doubt, under assurances, or a well-grounded confidence of priority of payment and perfect indemnity in case of failure. How often," he continues, "has it happened that that creditor is secured, who was the means of decoying others, while the real business creditor, who parted with his property on liberal terms and in manly confidence, is made the victim?" Now, is it not apparent that in the chancellor's own mind, there is a wide distinction between the two classes of creditors he has mentioned? That one is more and the other less entitled to be preferred? That he would approve a preference if made on grounds which he could sanction? And, after pointing out so forcibly the distinction between him

1. *Biggs v. Murray*, 2 Johns. Ch. 578.

who colludes with the debtor, and the fair business man who is entrapped, is his conclusion a sound one, that the proper corrective is not to examine the evidences of the collusion, and frustrate the fraud; but to put the least meritorious and the most meritorious—him who perpetrates, and him who is the victim of fraud, all on the same footing?

Let us hear the chancellor further: "Perhaps," says he, "some influential creditor is placed upon the privileged list, to prevent disturbance, while those who are poor, or are minors, or are absent, or want the means or the spirit to engage in litigation, are abandoned." This picture is well drawn, and addresses itself to our best feelings. But I apprehend the chancellor would not vacate a judgment obtained by the creditor he singles out. And if not, it deserves to be considered whether the absent, or the minors, or those wanting in means or spirit for litigation, are not just as likely to be left behind, if the preference is left to be established by priority in obtaining judgments.

In some of the cases wherein the assignments of debtors have been set aside, the instant effect of the decision was to create an inequality among the creditors, and to give a preference to the creditor, whose ground of complaint was that all were not put on a footing. The court, struck with the glaring inconsistency of this, with that equality at which it vainly aimed, has usually attempted to console itself and the suitors, and to cover over the contradiction, with the maxim, *vigilantibus, non dormientibus, leges subserviunt*. But what is that, but to admit that the law allows the vigilant to be preferred? It is preference still.

Now, while I deny that it is a natural application of the maxim, *vigilantibus, non dormientibus*, to give the benefit of it to him whose only necessity for coming into court was, that another, by superior vigilance, had obtained superior rights, of which a court only could deprive him, and to deny it to that other; while I contend that this is an inversion of the maxim--while I contend that the creditors who took the assignment in this case, have not been less vigilant, but more vigilant, than the creditor who has obtained a judgment; I am at a loss to perceive what moral principle it is, upon which those would proceed, who would set aside conveyances and liens existing—who would disturb things as they find them, merely because they give a preference—and substitute in their room a preference, to which the only title is vigilance. Vigilance is a very good thing;

and if left to depend on that, preferences would not be disturbed. But if they are to be disturbed, is vigilance the only moral quality entitled to consideration? Suppose the preferences complained of, besides being founded on superior vigilance, rest on generosity, humanity, gratitude, piety to parents, parental or conjugal affection, shall these all go for nothing?

The plain truth seems to be, that it is impracticable as to the mass of men, to put all creditors on a perfect equality: and if it was practicable, injustice would often follow. Undoubtedly the power to prefer, may be perverted and abused, even when the abuse discloses no fraud upon which a court can seize: but "the power, as it may be abused, so, on the other hand, may be very properly exercised." The discretion must be left to the debtor, within the limits of fraud. Society must depend for its indemnity upon the teachings of the debtor's heart and conscience; upon those moral lights, which all men possess; upon that native sense of justice; upon those better feelings, which exert a silent supremacy over even the worst of men. After all, most of the great interests and operations of society, depend mainly upon these. The law can only act in flagrant cases. But, without protracting these observations, I found myself upon this: that whatever may be thought of the morality or expediency of permitting a debtor to grant preferences, his legal right to do so is unquestionable.

Then, Ralph Johnson's assignment would not have been invalid, if he had simply preferred his other creditors over the plaintiff. It would have been clearly valid, if he had surrendered to the other creditors without condition. I suppose it would have been equally valid, as against the plaintiff, if in his surrender to them as privileged creditors he had required releases from them. Such a requisition, so far from being a subject of just complaint with the plaintiff, would have operated greatly to his advantage, by freeing the debtor's after acquisitions from claims which might otherwise have stood in the way of his obtaining satisfaction of his debt.

Then, if it would have been no fraud on him to prefer others over him, with or without conditions, is he defrauded by giving him an opportunity to participate with them—an opportunity which it would have not been fraudulent in Johnson to have withheld from him?

If he refuses to accept the condition, he is only thereby, and that by his own act, reduced to an unpreferred creditor. Not

only is he left in this uninjured condition, but, as I remarked before, he is positively benefited by the condition, although he has not accepted it: the acceptance of it by others, having warded off competing claims from the debtor's after acquisitions.

I am not aware of any decision in this state, which concludes anything on this point. Certainly it did not arise in the consideration of Evans' assignment. The authorities quoted against that assignment consisted of cases in which debtors had required a release from their creditors. There was no such provision in Evans' deed; and the court took notice of the fact, that the cases quoted turned upon the requirement of a release, for the purpose of showing that they did not apply to that deed. The court did not, as the occasion did not demand it, enter into an examination of the circumstances under which, in the cases quoted, the leases were required; so as to determine whether that simple requirement, without any other circumstance, would invalidate an assignment. It pronounced no opinion respecting the soundness or unsoundness of the decisions referred to. It merely pointed out their inapplicability to the case on trial. Nevertheless, the impression they left on me certainly was, that the mere requiring a release would avoid an assignment: and such, I believe, was the impression they produced on the court of appeals.

But upon a careful examination of the cases I have mentioned, and such others as are accessible to me, I have not found one wherein fraud was inferred, merely from such requirement. I will first turn to the cases referred to in *Vatughan v. Evans*, 1 Hill Ch. 420, for the purpose of setting out more particularly than I did in the decision of that case, the provisions which the assignors coupled with the requisitions of a release, in order to enable them to drive their creditors to terms.

In *Lord v. The Watchman*, Am. Jur. No. 16, p. 284, the trustees were to sell the property, and after paying such creditors as might accept upon the conditions required, pay over the surplus (notwithstanding there might be dissenting and unpaid creditors) to the assignor. *Hyslop v. Clarke*, 14 Johns. 459. The assignment contained a provision, that if any of the scheduled creditors should refuse to release, the trust for paying them ratably should not be executed by the trustees; but instead thereof, in that event, the trustees should hold the assigned property in trust, to pay Hyslop & Co. in the first place, and then such other creditors as the assignors should

appoint; and upon the further trust, in any event, to pay the surplus (without regarding dissenting or unpaid creditors) over to the assignors.

In *Seaving v. Brinckerhoff*, 5 Johns. Ch. 332, not only was the assigned property bound by judgment and execution, but the assignment provided that the trustee should sell the property; and "if the creditors would not accept upon the condition imposed" (that of releasing and receiving ratably), "the moneys were to be held in trust for the grantors."

Thus it appears that the debtors, unless the creditors would obey their commands, secured to themselves, a right to have their property reduced to a new form intangible by their creditors' executions, and difficult of access by any process, and in this form redelivered to themselves. This right of redelivering was not a resulting trust merely; but was secured by express provision in the assignment: so that the trustees were bound in strict compliance with their duty, and might have been compelled to convert the property to money, and pay it over to the debtors; and nothing but arresting them, and declaring the assignment void, could have prevented this.

This contrivance, this reservation of control over the property, this putting it out of reach of the creditors' process, was held in *terrorem* over the creditors' heads, unless they would release; and this constituted the fraud which vitiated the assignments. The effort was to put the property out of the reach of the law, and in the hands of trustees so constituted as to be mere instruments in the hands of the debtor; and not to let it go in payment of debts at all, unless on the debtor's own terms. It was not a fair surrender of the property, either with or without conditions. A control over it was still reserved. It was not surrendered. The language was, "I will not surrender unless you come to my terms; if you refuse, the property is sold, and being out of your reach, I will hold fast the avails, and defy the law."

In *Austin v. Bell*, 20 Johns. 442, 448 [11 Am. Dec. 297], the deed of assignment required the trustee to pay back to the debtor the proportions of such creditors as should refuse to release. Chief Justice Spencer insists on the distinction between this provision and that contained in the deed, in *Murray v. Riggs*, 2 Johns. Ch. 577,¹ in which it was stipulated that the shares of the dissenting creditors should be thrown into the general mass, for the benefit of the accepting creditors. He

1. S. C., 15 Johns. 571.

shows, by an examination of cases wherein assignments had been set aside, that the vice lay not merely in requiring a release, but in putting the assets in such shape as to be inaccessible to ordinary process; and then establishing, by the express terms of the trust, such control over them, in the grantor, that he could make or withhold payment, at his pleasure, accordingly as his creditors should submit to or reject the terms dictated by him. Our own insolvent debtor's act of 1759, confirms me in the opinion that, whatever the law may be elsewhere, in this state, at least, a debtor may lawfully assign his whole estate for the benefit of such creditors as will release him.

That act, after reciting among other things that "many persons" (whom, so far from condemning, it pronounces to be "proper objects of compassion") "may be willing to satisfy their creditors to the utmost of their power," provides, that if any person sued, impleaded, or arrested, "shall be minded to make surrender of all his effects, towards satisfaction of the debts wherewith he stands charged, or in which he shall be indebted to any persons whatsoever," he may file a petition, accompanied with a schedule of his effects, in the courts of law; who shall, thereupon, cause not only the suing creditors, but "all other the creditors to whom he shall be indebted, to be summoned." On a day fixed, the debtor is to take an oath, prescribed by the act, that his schedule contains a full account of his effects and credits, both at the time of filing the petition and of taking the oath; and that he has not, otherwise than as mentioned in the schedule, assigned or disposed of any part thereof, in such manner as thereby "to have or expect any benefit or profit to himself, or to defraud any of his creditors." The court, if "satisfied with the truth of the oath taken" by the debtor, shall (after making certain reservations of property dictated by humanity) order the effects specified in the schedule to be assigned by the debtor to persons to be named by the court; which "assignment shall be in trust for the suitors and such other creditors of the petitioner, as shall be willing to receive a dividend of his effects, and shall within twelve months from the time the petition was filed, make their demands."

Now for the effect of this. The act gives it the operation of a release from all the accepting creditors. It provides that the debtor shall, upon executing the assignment, and delivering his effects, so far as he has power over them, "be forthwith discharged from such suits, and shall also, thenceforth, be acquit-

ted and discharged from all such other of his creditors, as shall have received their dividends as aforesaid."

It does appear to me, that Ralph Johnson has acted in the very spirit of this statute. He has made the very assignment which it requires him to make; and which, if executed under compulsory process, the act declares, would have released him from all accepting, and been valid against all dissenting creditors. Surely it can not be a fraudulent evasion of the law to do voluntarily what that same law would sanction if done under process.

It seems no answer to this, to insist that an insolvent, proceeding under the act, assigns under strict scrutiny and under penalty of perjury. The scrutiny is to ascertain whether the debtor's whole estate is included in the assignment, and the perjury is in swearing falsely that it is. But the bill admits that Johnson has assigned his whole estate; thereby conceding the truth of what the act would have required him to swear; and rendering unnecessary any scrutiny whatever. If the bill had not done this, then the plaintiff would not have stated a case rendering the aid of this court necessary to him; inasmuch as, for aught that could be known, Johnson might still have had in hand enough property to satisfy his debt.

An argument was urged, that if no creditor, or but one creditor, holding an inconsiderable demand, had accepted under Johnson's deed, a trust would have resulted to Johnson for the residue of the assigned property; that this would have given him a control over the fund, enabling him to coerce the creditors into the execution of releases; and that the deed was, therefore, void for fraud at its execution, and was not cured by the subsequent acceptance of creditors to an amount sufficient to exhaust the fund.

If the case put by the objection had actually occurred; if after a full surrender by Johnson of all his effects, a trust had resulted to him, and had resulted merely in consequence of the non-acceptance of creditors, I apprehend this would not have vitiated his assignment. The authorities draw a distinction between a resulting and an express trust to the assignor; between cases where the debtor has reserved a control, and given himself a preference over the creditors and those in which he has surrendered all, in terms which give them a preference over him. If a trust result in the latter case, the remedy of unpaid creditors is to be let in to an account of the surplus in the trustees' hands. The existence of this distinction renders it un-

necessary to inquire whether the acceptance or non-acceptance of the other creditors was not matter for their exclusive consideration, and not for the consideration of the plaintiff.

It also renders it unnecessary to inquire whether the supposed defect has not been cured. If it were not unnecessary to go into this inquiry, the inclination of my mind is against the plaintiff. The other creditors have, by closing with the offers made them, made a case in which no overplus can result to the debtor's hands; so that he has not any fund, by a control of which he can dictate terms to the plaintiff. It would seem unreasonable to say, that under these circumstances the plaintiff should be allowed to resort, not to the actual case, but to one now altogether supposititious and put beyond the range of possibility, and found a complaint thereon; especially since the entertaining that complaint can have no other effect than to divest the other creditors of rights which it has been shown, I think, they hold without fraud on him.

The only thing remaining for consideration, is whether the sale made by the assignors is valid. It appears that they called upon the creditors to appoint an agent, under the act of 1828; and that the creditors failed to do so. The sale is therefore valid. Indeed, I did not understand the plaintiff's counsel to contend against the sale, but only against the validity of the assignment; professing a willingness, if the assignment should be avoided, to take an account of the avails of the assigned property in the trustees' hands.

Upon the whole, I feel bound, much against my first impressions, to sustain the assignment. But as I conceive the plaintiff had strong grounds to question its legality, each party will pay his own costs. If the plaintiff chooses to have an account of any surplus which may be left after paying the accepting creditors, the bill will be retained until the next term, to give him an opportunity.

It is decreed that it be dismissed, in all other respects; and that each party pay his own costs: those of the trustees, to be allowed them out of the assigned fund.

On an appeal by the plaintiff from this decree, the question as to the validity of the assignment was argued at length by Wethers for the appellant. The court concurring with the chancellor, the decree was affirmed.

DE SAUSSURE, JOHNSON, and HARPER, CO., and O'NEALL, EVANS, EARLE, and BUTLER, JJ., concurred.

GANTT, J. I entertain serious doubts as to the correctness of the principle established by this decree. Indeed I feel satisfied that it is in violation of the constitution.

Denied in *Miller v. Conklin*, 17 Ga. 430, 433, as to the principle stated in the first paragraph of the syllabus.

DEBTOR MAY PREFER ONE CREDITOR TO ANOTHER.—*Sommerville v. Horton*, 26 Am. Dec. 242, note 247, where the other cases on this subject are collected.

EXACTING RELEASE IN ASSIGNMENT, EFFECT OF: See *Atkinson v. Jordan*, 24 Id. 281, and note 293, where other cases are collected.

RESERVATION IN ASSIGNMENT for the benefit of the debtor or of his family renders the assignment void. See *McClurg v. Lecky*, 23 Id. 64, note 71, where the cases are collected.

BANKS v. BROWN.

[2 HILL CH. 538; S. C., 1 RILEY CH. 131.]

DEED WHICH WOULD BE VOID, FOR WANT OF CONSIDERATION, at date of its execution, may be supported by parol proof of subsequent valuable consideration; hence a deed by a husband, to the use of his wife, expressed to be in consideration of love and affection, may, by parol proof, be shown to have been really executed by him in consideration of her renouncing her inheritance in property which he obtained with her, and which he was then about to sell, and such deed will be supported as against his creditors, although he was indebted at the time of its execution.

MARRIAGE SETTLEMENTS, WITHIN THE MEANING OF THE REGISTRY ACTS, are such only as are founded on the consideration of marriage, and entered into before the marriage, or afterwards in pursuance of previous articles, or as are voluntary conveyances by the husband to the use of the wife, after the marriage.

DEED OF SETTLEMENT BY A HUSBAND AFTER MARRIAGE executed in consideration of the wife's renunciation of her inheritance in her real estate, need not be recorded as a marriage settlement; and such deed is valid as against his creditors.

HUSBAND WILL NOT BE ALLOWED TO DEFRAUD HIS CREDITORS by making an unreasonable settlement upon his wife, but such settlement, if reasonable, will be supported.

BILL filed by the plaintiffs, creditors of Charles T. Brown, to set aside certain conveyances alleged to be void as against creditors. The cause was heard before Chancellor De Saussure, who made a decree to the following effect: That the deed of November 10, 1829, by which Charles Brown conveyed to J. A. Keith and P. T. Keith, a plantation at Goose creek, and forty-one negroes, in consideration of natural love and affection, was purely voluntary, and that the property therein named must be subjected to the claims of the creditors. That the deed of June 1, 1824, by which a house and lot in Charleston were

conveyed to trustees for the use of Mrs. Brown for her life, remainder to her children, must be sustained, as the property therein conveyed was purchased by the money of Mrs. Brown, in the hands of the administrator of her father's estate, and this property is not subject to the debts of the husband. That the deed of January 19, 1825, executed by Charles T. Brown to trustees, by which, in consideration of love and affection, he conveyed to them Sandy Island plantation and forty negroes, in trust for his wife for life, remainder to their children, could not be sustained, it not being capable of being made to come within the idea of a purchase, and not having been recorded as marriage settlements are required by law to be. That the deed of February 7, 1826, by which, for the consideration of ten thousand and seventy-seven dollars, twenty-nine negroes were conveyed to trustees for the use of Mrs. Brown and her children, was a purchase in consideration of the wife's renunciation of her inheritance in her real estate, and valid as against creditors. The defendants appeal from so much of the decree as subjects Sandy Island and the negroes to the creditors of Brown. And the plaintiffs appeal from the part of the decree that dismisses so much of their bill as seeks to set aside the settlement of the house and lot of land in Charleston, contained in the deed of June 1, 1824, and the settlement of twenty-nine slaves, contained in the deed of February 7, 1826.

Eggleston and Frost, for the defendants.

De Saussure and Bailey, for the plaintiffs.

By Court, JOHNSON, Chancellor. The grounds of the defendant's appeal grow out of a deed executed by the defendant, Brown, on the nineteenth of January, 1825, by which he conveyed to trustees, for the use of his wife, a plantation on Sandy Island, and forty slaves. The consideration expressed is natural love and affection, but the proof is very abundant that Brown was, at the time, negotiating the sale of a large real and personal estate, which he afterwards sold for one hundred and twenty thousand dollars, and which he had acquired by the wife; and that the deed above mentioned, was the inducement to Mrs. Brown to join in the conveyance of the land to Colonel Hunt, and renounce her inheritance, and that this was the true consideration. As a mere voluntary conveyance for the use of the wife, the deed would necessarily be void as to the creditors of Brown; and regarded as a marriage settlement, it was equally void, not having

been recorded in the office of secretary of state; the questions then arise:

1. Whether parol evidence was admissible, to show that Mrs. Brown's renunciation of her inheritance entered into the consideration of the deed, and whether that is a sufficient consideration to support the deed against creditors.

2. If the consideration be valuable, whether the deed ought to have been recorded in the office of the secretary of state, as a marriage settlement.

The general rule is, that parol evidence is inadmissible, to add to, or vary the terms of a deed, or to show any circumstances inconsistent with it; and if the converse of the rule be true, it follows, that anything may be admitted which is consistent with it. On this principle, parol evidence has been admitted to supply a consideration, where none has been expressed in the deed, and to show a particular consideration where that expressed was general, as for "divers good causes and considerations:" 1 Ph. 481, 482, 483. And I can not perceive why, if there are two considerations existing at the time of the execution of the deed, one only of which is expressed, parol should not be admitted to show the other and better. So far from tending to contradict the deed, its object is to support it, and must necessarily be consistent with it—the addition of a circumstance necessary to give it effect. And it strikes me, that this is the more reasonable where it is a third party, a stranger, who seeks to avoid the deed on account of the want of consideration. The case does not rest, however, entirely on this question, and it is not necessary to decide it. The true consideration of the renunciation of Mrs. Brown's inheritance in her real estate, was subsequent to the execution of the deed of nineteenth January, 1825, and I take it as well settled, that a deed, void for want of consideration, may be supported by parol proof of a subsequent valuable consideration. In this, there is clearly nothing inconsistent with the deed, but the proof of a substantive independent fact, arising subsequently to its execution. This point is expressly relied on in *McDowall and Black v. Gist* [*Gist v. Davis*, 29 Am. Dec. 89], decided not long since in Columbia, and to which I refer for the argument. Atherly, in his treatise on marriage settlements, page 159, in speaking of the consideration necessary to support settlements after marriage, says that giving up an interest in the settler's estate, will be a sufficient consideration, although it is not expressly relinquished in consideration of the settlements,

and although not relinquished by the same deed, or another at the same time; for if it is done about the same time, so that it be reasonably presumed to be part of the same transaction, it would be presumed so, and looked upon as the consideration which produced the settlement.

Now, had the settlement preceded the relinquishment of Mrs. Brown's inheritance, independent of the parol proof, these deeds furnish very strong intrinsic evidence of the true consideration. There is another principle on which this deed may be supported. The plaintiffs come here to be relieved against an advantage which the defendants possessed at law, on the ground that the consideration being love and affection only, the deed is void as to creditors. Now, the proof is very conclusive, that Mrs. Brown renounced her inheritance on the faith that a provision had been made for her by this deed. The witness, Smith, says expressly, that she would not have renounced but on that assurance; and if evidence of this fact is admissible, it is very clear that the right and justice of the cause is with her. In the *Marquis of Townshend v. Stangroom*, 6 Ves. 328, which was a bill for the specific performance of an agreement to lease a farm, Lord Eldon admitted parol evidence, to show that the written agreement was not according to the terms stipulated in the treaty; and he observes, that if parol evidence is to be excluded in equity because it is at law, all the cases of hard bargains, unconscionable agreements, and agreements entered into by mistake or surprise, must be struck out: and he refers to a MS. note of Lord Hardwicke, in the case of *Rich v. Jackson*, in which his lordship says that he had often known parol evidence in cases where an attempt had been made to obtain, by a decree of the court, a further security or more ample interest than the party was in, by the possession of the paper itself, to show that the demand was fraudulent and unfair—and in which relief had been refused on that ground. This is exactly that case. The plaintiffs come here to ask the court to set aside the deed of the nineteenth of January, 1825, that they may be let in as creditors of Brown. The effect must be to deprive Mrs. Brown of the equivalent for which she stipulated when she released her inheritance in a very ample estate, and reduce her to a state of comparative want. I think she is protected by the principle.

In *Prescott v. Hubbell* (not reported), decided in this court in 1827, it was held that a conveyance by the husband to the use of the wife, in consideration of her renouncing her dower in

lands which he had sold, was sufficient to support the conveyance against the creditors of the husband. So in *McMeekin v. Edmonds*, 1 Hill Ch. 288 [26 Am. Dec. 203], where the land of the husband was sold by the sheriff under execution, and the purchaser, a stranger, conveyed to trustees for the use of the wife, the husband having paid the principal part of the purchase money, it was held that the conveyance was good against the creditors of the husband; and it follows, that the renunciation of the wife's inheritance in her own lands, and of which no power can deprive her but with her own consent, must be equally valid. Our registry act requires "all marriage settlements" should be recorded in the office of the secretary of state, within a limited time after they are executed, and declares that they shall be void, unless they are so recorded. But there is some diversity of opinion as to what constitutes a marriage settlement, within the meaning of the act. *Prima facie*, the terms obviously import a settlement founded on the consideration of marriage; and could not, therefore, directly apply to settlements entered into after the marriage, unless made in pursuance of articles previously entered into; but in *Price v. White*, Car. Law Jour. 297, it was held that a voluntary settlement made by the husband after marriage, to the use of his wife, was within the mischiefs contemplated by the statute, and was void unless so recorded. That, I then and still think, was going quite far enough—extending the construction of the statute to its utmost limits. It never could have been intended to apply to all conveyances for the use of a married woman. If a parent thinks proper to convey or devise an estate to the separate use of his married daughters, with what propriety is that denominated a marriage settlement? Marriage does not enter into the consideration; and did the legislature in framing the act, contemplate this state of things, and intend to provide for it under the term "marriage settlement"? I think not; they might, and would have employed more appropriate terms. So, if a stranger convey to the use of a married woman, or if she invest her pin-money, or her other separate funds in lands, and procure them to be conveyed to trustees to her separate use, what could be more foreign than the terms "marriage settlement," applied to these transactions? But the cases of *Prescott v. Hubbell*, and *McMeekin v. Edmonds*, are direct authorities on the point. They are not marriage settlements within the meaning of the act; and in what do these cases differ from the case where the

wife acquires an estate in exchange for her inheritance, whether she obtains it from her husband or a stranger.

I conclude, therefore, that no settlement or conveyance falls within the purview of the act, except such as are founded on the consideration of marriage, and entered into before the marriage, or afterwards, in pursuance of previous articles, or voluntary conveyances by the husband to the use of the wife, after the marriage.

The grounds of appeal, on the part of the plaintiffs, are entirely covered by the foregoing observations. William S. Smith, the administrator of George Smith, the father of Mrs. Brown, advanced to Brown eleven thousand dollars to purchase a house in town, to be conveyed to the use of Mrs. Brown; and he did, accordingly, so invest it. No provision having been before made on Mrs. Brown, the administrator was right in insisting on these terms. The conveyance of Robert Heriot to Keith, of twenty-nine negroes to the use of Mrs. Brown, is expressed to be in consideration of the renunciation of her inheritance; and on the principles laid down, the consideration in both cases is valid against creditors; nor was it necessary to record the deed in the office of the secretary of state.

In the discussion of the case, some remarks were made by the counsel, as to the magnitude of the provision made by those deeds for Mrs. Brown; and clearly the law would not justify the husband in attempting to defraud his creditors by using the interests of the wife, as a cover for making an unreasonable settlement on her. But it will be remembered that Mrs. Brown was otherwise wholly unprovided for—that on the death of her father intestate, an estate, consisting of lands estimated at sixty thousand dollars, which when sold with a part of the negroes only brought the large sum of one hundred and twenty thousand dollars, descended to her, and that the highest conjectural estimate of the value of the property secured to her does not exceed forty-five thousand dollars. No direct question has been made on the subject. It is therefore unnecessary to enter into a minute calculation of the reasonableness of the provision; and I confess, that under the circumstances, I should not be disposed to look into it with too much exactness. With proper diligence the creditors might have saved themselves out of the large estate which Brown has dissipated.

It is therefore ordered and decreed that so much of the decree of the circuit court as subjects the lands and negroes described in the deed, from the defendant Brown, to John A.

and P. T. Keith, of the nineteenth January, 1825, with the payment of Brown's debts, be, and the same is hereby set aside and reversed. In other respects it is affirmed.

Chancellors HARPER and JOHNSTON concurred.

MARRIAGE SETTLEMENT, RECORDING OF: See *Miller v. Kershaw*, 23 Am. Dec. 183, note 185.

VOLUNTARY SETTLEMENT UPON A WIFE, AFTER MARRIAGE, pursuant to a parol agreement made before marriage, but without referring to such agreement, is fraudulent and void as to creditors existing at the time of the settlement: *Reade v. Livingston*, 8 Id. 520, note 537.

SETTLEMENT ON WIFE AND ILLEGITIMATE CHILDREN, when not void: See *Coutts v. Greenhow*, 5 Id. 472.

NATURE OF MARRIAGE ARTICLES, AND RIGHTS OF PARTIES UNDER: See *Tabb v. Archer*. 3 Id. 657.

EPISCOPAL CHURCH OF MACON v. WILEY.

[2 HILL CH. 584; 8. C., 1 RILEY CH. 156.]

AUCTIONEER AT SALE OF LAND is the agent of both parties, and his memorandum in writing is sufficient to take the agreement out of the statute of frauds.

AUCTIONEER'S MEMORANDUM, ENTERED IN HIS BOOK AS EARLY AS PRACTICABLE AFTER THE SALE, from a pencil memorandum on a loose slip of paper, made at the moment of the sale, is sufficient, and is to be regarded as the original entry.

PARTY CONTRACTING WITH AGENT NOT KNOWING HIM TO BE AGENT, may enforce the contract against the principal when he discovers him.

BILL to enforce a specific performance of a contract for the purchase of land. The contract was made in Georgia, between citizens of that state, concerning a town lot in Macon. The lot was sold at auction, and bought in by defendant, Rowland, for two thousand four hundred dollars. The auctioneer then entered Rowland's name on a loose slip of paper, in pencil, and on his return to his office entered the sale in his sales book. Rowland having referred the auctioneer to Wiley, the latter enters into the treaty and arrangements, whether individually, or as a member of the firm of Wiley, Baxter & Carter, is a question of evidence. A defect in the title being discovered, the parties agree to suspend the execution of the contract until the legislature of Georgia shall make good the title. The land, meanwhile, depreciates, and Wiley refuses to take it. He removes to South Carolina, and this bill is filed against him here. The cause was heard before Chancellor Johnston, at

Charleston, who rendered a decision and made a decree to the following effect: That there was between Rowland and Wiley the connection of either agency or joint interest; that Rowland made a valid contract, which was in either case binding upon Wiley; that Rowland's answer overruled his plea of the statute of frauds, even though the auctioneer's memorandum were insufficient; that Wiley's answer admitted the sale, the terms, and the thing sold; that the authority of the bidder need not be in writing; that it was immaterial whether Rowland contracted as the agent or partner of Wiley; that Rowland's answer admits that the purchase was made jointly; that the court will, therefore, leave it to the defendants to determine whether the decree shall be that Wiley take the titles and pay the money as principal of Rowland, or whether the conveyance be made to them jointly. No election having been made, the chancellor decreed that, upon the plaintiff's executing and delivering deeds to the defendants, the latter shall pay to the plaintiffs the two thousand four hundred dollars, with interest and costs. The defendant Wiley appeals, upon the following grounds: 1. Because his honor decreed that the plea of the statute of frauds was overruled by the answer; 2. Because he decreed that the court had jurisdiction in the case, although the contract was made in another state, between citizens of such state, and in reference to lands lying in that state; 3. Because if the contract was between a citizen of this state and citizens of another state, the suit ought to have been brought in the courts of the United States; 4. Because his honor decreed a specific performance against Wiley, although he was interested in the contract only as one of the firm of Wiley, Baxter & Carter; 5. Because he decreed a specific performance against the defendant, although the remedy was not mutual, and the court had no power to enforce performance of the contract on the part of the plaintiffs, who were without its jurisdiction; 6. Because time is material in enforcing a contract, when the circumstances of the parties are changed, and the property had depreciated during the period of delay on the part of the plaintiffs, and therefore a specific performance ought not to be decreed against the defendant.

Smith, for the motion.

Petigru, *contra*.

By Court, HARPER, Chancellor. The second and sixth grounds of the motion, which relate to the points chiefly considered by the chancellor below, have been abandoned.

With respect to the first ground, we do not think it necessary to determine, whether the answer overrules the plea; because we are of opinion, that there was a sufficient memorandum in writing to take the agreement out of the statute of frauds, the auctioneer being regarded as the agent of both parties. It is agreed, with respect to goods sold at auction, he must be so regarded; but some of the earlier cases, determined that this could not be extended to lands: *Stansfield v. Johnson*, 1 Esp. N. P. 101; *Buckmaster v. Harrop*, 7 Ves. 341. But Lord Eldon expressed a different opinion in *Coles v. Trecothick*, 9 Id. 234, which has been followed ever since—by Lord Erskine in the same case, of *Buckmaster v. Harrop*, 13 Id. 456, and by Sir Wm. Grant in *Kemeys v. Proctor*, 3 Ves. & B. 57. He states that he should himself have been of a different opinion, but was governed by the decisions of the court of common pleas, in *Emmerson v. Heelis*, 2 Taunt. 38, and *White v. Proctor*, 4 Id. 209, to the same effect with the equity cases cited. The same thing has been decided in New York: *McComb v. Wright*, 4 Johns. Ch. 659. I, myself, expressed a different opinion, in a case decided by me as chancellor; but upon its being carried up to the court of appeals, that court overruled my opinion; so that the question may be regarded as settled.

Then an objection was taken to the sufficiency of the memorandum, as not setting forth sufficiently the description of the property, and the terms of sale. I do not understand the objection to apply to the entry in the auctioneer's book, but to the pencil memorandum made on the land at the moment of sale, which it was thought constituted the true memorandum. But this is contrary to the universal understanding. The entry in the auctioneer's book was made as early as practicable. If a memorandum of sales be made by a shopkeeper, in pencil, or on a slate, and afterwards entered in the day-book, the latter is always regarded as the original entry. Then it was argued, that having contracted and dealt with Rowland, the plaintiffs have no recourse against Wiley. But it is perfectly well settled, that if a party contracts with an agent, not knowing him to be agent, and afterwards discovers the principal, he may afterwards enforce the contract against the principal: See *Paterson v. Gandasequi*, 15 East, 62, and *Railton v. Hodges*,¹ 4 Taunt. 576, etc. There is a difference if the party contracts with an agent, knowing of the principal. There, if after he knows the principal, he continues to deal exclusively with the

1. *Railton v. Hodgeson*.

agent, and gives the credit to him, the principal will be discharged: *Addison v. Gandasequi*, 4 Taunt. 574. Here, however, the plaintiffs dealt with the principal from the time they discovered him. The case of *Kemey's v. Proctor* seems to have been, in this respect, precisely like the present. The auctioneer entered the sale as made to the agent, and the contract was enforced against the principal. It is clear that the auctioneer's authority need not be in writing: See Lord Eldon in *Coles v. Trecothick*.

The third ground was not urged in argument. The fourth ground involves matter depending on testimony, with respect to which we have no reason to distrust the chancellor's conclusion. The fifth ground was not urged, and seems to be without foundation.

The decree is affirmed.

Chancellors JOHNSON and JOHNSTON concurred.

Cited in *Doty v. Wilder*, 15 Ill. 410, to the points, that an auctioneer is the agent of both parties, that his memorandum in writing takes the case out of the statute of frauds, and that the same rule, in reference to these matters, is applicable to sales of real and personal property.

AUCTIONEER IS AGENT OF BOTH PARTIES: *Meadows v. Meadows*, 15 Am. Dec. 645; *Davis v. Robertson*, 12 Id. 611, note 616.

AUCTIONEER'S MEMORANDUM, WHAT IT MUST SHOW: See *Meadows v. Meadows*, 15 Id. 645.

PRINCIPAL, WHEN DISCOVERED, IS BOUND by acts of agents: See note to *Beebe v. Robert*, 27 Id. 137; *Hyde v. Wolf*, 23 Id. 484.

BLACK v. HAIR.

[2 HILL CH. 622.]

MORTGAGEE OF PERSONAL PROPERTY MAY PURCHASE AT HIS OWN SALE; but he holds such a trust character as to throw upon him the burden of proving the fairness of such purchase.

BILL to set aside a sale. The bill charges that the plaintiff gave his father a mortgage on certain slaves, farm utensils, and stock, to secure the payment of a certain sum of money; conditioned that in default of payment the property might be sold to the highest bidder, to satisfy the debt. The defendants administered upon the mortgagee's estate, and, default having been made in the payment, they sold a part of the property, and themselves became the purchasers at inadequate prices. The answer admits the sale and purchase, but insists that the

sale was fairly conducted. One of the defendants admits that he made a profit of twenty-five dollars on the purchase of one of the slaves bought at the sale. The answer denies fraud. Chancellor De Saussure, before whom the cause was heard, decreed that there was no sufficient ground to vacate the sales, which he held to have been fairly made. Plaintiff appealed, and insisted that the defendants were trustees to sell, and as such were not at liberty to purchase at their own sale.

Herndon and Caldwell, for the appellants.

Pope, for the appellees.

JOHNSTON, Chancellor. A majority of the court is of opinion that the plaintiff's appeal can not be sustained. The opinion of the court (in which, to avoid being misconceived, I state that I do not concur) is, that a mortgagee of personalty does not fall within the principle which prevents a trustee to sell from buying at his own sale. It is my province to state the reasons which have conducted my brethren to this conclusion.

A creditor holding a mortgage security, is a trustee to sell, not only for the benefit of the mortgagor, but for his own also. If he were not at liberty to bid, he would be deprived of the means of protecting his own interests as creditor. The mortgagor is at liberty to bid also, and has thus the means of entering into fair competition with the mortgagee, and compelling him to give a fair and full price.

But the court is of opinion that although a mortgagee does not stand in that relation to the mortgagor which would subject him to an order setting aside, as of course, his purchase at his own sale; yet that he holds such a trust character, as to throw the burden on him of supporting his purchase, by proof of fairness.

In this case the commissioner and chancellor have drawn an inference from the evidence before them, that there was no actual fraud in the sale; and they appear to be well warranted in their conclusion.

Chancellors DE SAUSSURE, JOHNSON, and HARPER concurred.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

KINCANNON v. CARROLL.

[9 YERGER, 11.]

VALIDITY OF AN OFFICIAL BOND can not be impeached by the officer or his sureties on the ground that it does not conform to the statute where it appears that the bond was more favorable to the obligors than that required by the statute.

ALTHOUGH THE CONDITION OF AN OFFICIAL BOND may not be as extensive as the statute authorizes, yet so far as an obligation is created, it is good. **AN OMISSION IN A BOND RENDERING IT INSENSIBLE** may be supplied by reference to the whole bond whereby the intention of the parties can be ascertained.

WENT of error from a judgment against Kincannon, sheriff and collector of Lincoln county, and his sureties. The condition of his bond was that "the above bound A. A. Kincannon shall well and faithfully pay to the treasurer of the district of Tennessee, all taxes of him collected or which ought to be collected, on or before the first of January, 1833, and the first of January, 1834, then the obligation to be void, else to remain in full force and effect."

T. Washington, for the plaintiff in error.

George S. Yerger, attorney-general, contra.

By Court, GREEN, J. Two questions are raised upon this condition. 1. It is insisted that as the act 1803, c. 3, sec. 14, prescribes, that the bond shall be conditioned to pay the taxes to the treasurer, on or before the first day in December in each year, and as the bond in this case is conditioned to pay on or before the first day of January, it is not a statutory bond, and

no judgment by motion can be rendered. The difference between the bond which was executed, and that directed by the act of assembly to be taken, is in favor of the obligors, as it gives the sheriff one month longer, within which to pay the taxes. The court has constantly held, in relation to appeal and certiorari bonds, that although the condition might not be so extensive, as the act of assembly authorized, it was nevertheless good, as far as an obligation was created, and that to that extent a judgment might be rendered. The principle of these cases applies here. Although the collector is not required to pay the taxes so early by a month as the law authorizes, yet as the delay was beneficial to him, the bond was good to compel him to pay, at the time specified in it. In addition to this it may be remarked, that as by the fifteenth section of the same act, the collector is required to pay the taxes to the treasurer, by the last day of December, no proceeding can be had against him for non-payment. The bond, though in form as directed in the preceding section, is made payable the first day of December, yet it is not, in fact, payable till the last day of that month, so that the condition of the bond, in this case, corresponds with the obligation created by law.

2. It is insisted, that as the law requires the bond to be conditioned for the payment of the taxes to the treasurer of the district, where the said sheriff resides, and in this bond he undertakes to pay to the treasurer of the district of Tennessee, and as there is no such officer, there is no obligation created to pay to any one, and therefore no recovery can be had. This sheriff resided in Lincoln county, within the district of the treasurer of West Tennessee, and the taxes should have been made payable to the treasurer of the district of West Tennessee. To have specified the place where payable, with critical accuracy, would only have required the insertion of the word "West" before the word Tennessee. This was manifestly intended by the parties. They live in West Tennessee. The law requires the sheriff to pay to the treasurer of West Tennessee, and except the omission of the word "West" they use all the words necessary to show a strict compliance with the law. The words used are insensible, if we are not permitted to supply the word "West;" but supplying that word, they are sensible, and are the precise words the law required should be used. This being the case, may not the word be supplied? We think it may. In the case of *Coles v. Hulme*, 15 Com. L. 295,¹ a suit

1. 15 Com. L. 282; S. C., 8 Barn. & Cress. 562.

was brought upon a penal bond, the penalty being described as "seven thousand seven hundred," without any species of money being mentioned. It however appeared from the recitals in the condition, that various sums expressed in pounds, were agreed to be paid, and hence it was apparent, that the parties intended to express the penalty also in pounds, and therefore the court said, that in furtherance of the intention of the parties the word "pounds" might be supplied. This case is full to the point, and so reasonable in itself, that we fully concur in its principle. But if the words, "district of Tennessee" were rejected, so that it would read "pay to the treasurer," without specifying to which treasurer, the law would have directed the sheriff, and would have made it obligatory on him to pay to the treasurer of West Tennessee.

Judgment affirmed.

DAVIDSON v. PHILLIPS.

[9 YERGER, 93.]

IN AN ACTION OF FORCIBLE ENTRY AND DETAINER, the title is not to be inquired into.

ONE HAVING TITLE CAN NOT ENTER AND DISPOSSESS BY VIOLENCE one having no title whatever.

IT IS SUFFICIENT EVIDENCE OF POSSESSION to lock the doors of the house, close the windows, and drive cattle on to the premises.

ONE WHO ENTERS UPON PREMISES SO POSSESSED will be presumed to have done so forcibly, there being no other way in which entrance to the house could be obtained, those in possession having refused to give up the keys thereto.

FORCIBLE entry and detainer. Judgment for the plaintiffs below. The case sufficiently appears from the opinion.

F. B. Fogg, for the plaintiff in error.

Thompson, contra.

By Court, **TURLEY, J.** There are some trivial objections taken to the proceedings before the justices, which being merely as to matter of form, are not scarcely pressed, and need not occupy the attention of the court. The two points demanding the consideration of the court, are: 1. Were the defendants in error ever actually in possession of the premises in dispute? 2. Was that possession ousted by the forcible entry and detainer of the plaintiff in error?

The writ of forcible entry and detainer is given in order to preserve the peace and harmony of society, by preventing

persons who have conflicting titles to the same lands, from taking redress of their wrongs into their own hands. It is therefore expressly provided, that title shall never be inquired into in this mode of proceeding, the only question being, who was in possession, and how that possession was lost. If it were otherwise, serious would be the consequences to society; for when the title to land is to be disputed, the possession is a matter of great importance, and if it were left to be struggled for between the parties by force and violence, the peace of the community would not only be destroyed, but in very many instances bloodshed would be the consequence. Therefore it has been determined, that no matter how perfect a man's title may be, if he enter upon the possession of another, who has no title whatever, by violence, he can not protect himself against the operation of a writ of forcible entry and detainer. Even a landlord, after the expiration of the lease, can not enter upon the possession of his tenant: 3 Marsh. 345.¹ What then constitutes an actual possession? In the cases of *Brumfield v. Reynolds*, 4 Bibb. 388; *Henry v. Clark*, 4 Id. 426; *Chiles v. Clark*, 3 Marsh. 347,² it is said, "a person may be in possession of land without having a crop growing on it;" "or a person residing in the house, or the field inclosed by a fence, or any act done by the owner of the land after his tenant has left it, indicating an intention not to abandon, but to hold possession to himself, will continue the possession in him."

In this case, defendants in error claimed title to the land; the tenant was about to give up possession; his landlord (the vendee of defendants) had been notified thereof, and requested to resume the same, which he declined doing, no doubt because of his bill for the rescission of his contract. Defendants, to protect their rights, take possession by locking the doors of the house, closing the windows, and driving a portion of stock upon the premises. These acts are clearly evidence of an actual possession, according to the authorities above quoted, and from which the jury were well authorized in finding a possession in the defendants. It was a question of fact for their determination, and was by the charge of the court left to them. We are satisfied they found it correctly. Then the defendants having been in possession, the next inquiry is, was that possession ousted by the forcible entry of the plaintiff? This is also a question of fact, which by the charge of the court was left to the jury, and found by them in favor of the defendants in error, as we think correctly. The

1. *Chiles v. Stephens*, 3 A. K. Marsh. 345.

2. *Chiles v. Stephens*, 3 A. K. Marsh. 347.

proof shows, that the house was locked and the windows closed; that the plaintiff applied to the agent of the defendants and demanded possession, which was refused. How did he get it? The inference is irresistible—by breaking the doors, windows, or some other part of the house. A forcible entry, within the very words of our act of 1821, c. 14, sec. 1. There being then a possession by the defendants in error, and a forcible entry by the plaintiff in error, the judgment of the court below was correct. Let it be affirmed.

Judgment affirmed.

In the subsequent decision of *Childress v. Black*, reported on page 317 of 9 Yerger, the subject of forcible entry and detainer was considered in reference to the following facts: The premises in question had been in the actual possession of one Black in right of his wife, but at the time of the entry complained of, and for some time prior thereto, there had been no one in occupancy, the house having been kept locked up, Black retaining the key. Childress and Wiley having procured a deed of the premises from one who claimed under conveyance from the ancestor of Black's wife, told a witness that they were going to take possession of the house, saying that they had the original key. Witness accompanied them, but could not tell whether the key was used to open the door, knowing merely that they opened the door and went in. "Black shortly after came to the house; Childress stood in the porch with Black, and Wiley in the door with his pocket-knife in his hand. Black told them to go peaceably out of his house. They told him it was their property, and they would hold the possession unless taken from them by better title. Childress took witness into a back room; said Black was very hot or angry, and it was possible would use violence to take the possession, and asked if witness had arms. Witness gave his opinion that Black had none, and would not use violence. Bailey, a witness, proved that Wiley, speaking to him of the above-mentioned interview with Black at the door of the house, said that he had the possession, and was determined on keeping it; that he had no property within the house, and knew if Black had entered the house, he would have had possession as much as he had." Upon these facts, in proceedings of forcible entry and detainer, judgment of restitution was given against Childress and Wiley in favor of Black and wife. Upon certiorari to the supreme court, it was said: "As to the first question whether the defendants below, as shown by the record, were guilty of forcible entry and detainer, we entertain no doubt. To constitute this offense, it is not necessary that violence and outrage upon person or property should in fact be resorted to. If the actual possession of another, in a house or tenement, be invaded, taken, and held under circumstances to show that it will not be surrendered without a breach of the peace on the one side or the other; this constitutes a case of forcible entry and detainer. The statute was intended to prevent bloodshed, violence, and breaches of the peace, too likely to arise from wrongful intrusion into the possession of another, and to give a right to restitution under the statute; it is not so absurd as to require actual bloodshed and violence, and frequent breaches of the peace in the acquisition or retention of the possession." The second question presented in this case was whether the petition for a writ of certiorari, which showed upon its face that the petitioners had been guilty of a forcible entry and detainer,

should be dismissed notwithstanding the fact that the proceedings below were informal and defective, and the court was of opinion that a dismissal was proper.

FORCIBLE ENTRY AND DETAINER.—This subject is examined in the note to *Evill v. Conwell*, 18 Am. Dec. 139. Other decisions in this series are *Rees v. Lawless*, 12 Id. 295; *Hoskins v. Helm*, 14 Id. 133; *Mattox v. Helm*, 15 Id. 64; *State v. Bennett*, 18 Id. 663; *Butts v. Vorhees*, 22 Id. 489; *Tribble v. Frame*, 23 Id. 439.

HICKMAN v. CANTRELL.

[9 YERGER, 172.]

BY THE COMMON LAW, ESTATES DEFEASIBLE by the payment of money on a particular day were estates upon condition which became absolute by the non-payment.

WHETHER AN INSTRUMENT IS A MORTGAGE OR CONDITIONAL SALE depends upon the intention of the parties, to be gathered from the deed and the evidence.

TO MAKE A DEED A MORTGAGE ON ITS FACE, it must either show that the consideration was money loaned or a debt due, or it must express a covenant for the repayment thereof.

ON A CONDITIONAL SALE the condition must be strictly performed, and the tender made with all the formalities required by law.

BILL to redeem a negro. The opinion states the case. Decree dismissing the bill, whence an appeal was taken.

Meigs, Rucks, and Thompson, for the complainant.

J. S. Yerger and W. E. Anderson, *contra*.

By Court, **TURLEY, J.** Two questions arise for consideration in this case: 1. Is the transaction between complainant and defendant a mortgage or a purchase, with liberty to repurchase?

By the common law, all estates which were created defeasible by the payment of money on a particular day by the vendors, were held to be estates upon condition, and if the day appointed for the payment were suffered to elapse without its being made, the estate became absolute, because, in estimation of the law, the estate was the thing contracted for, and the money collateral thereto. This principle was necessarily applied, as well to cases where the estate was merely designed as security for a debt due, as where the intention was to sell upon a condition of repurchase. This doctrine was so rigorous, and in its operation so frequently productive of the most intolerable injustice, that the courts of chancery, at an early period, experienced the necessity of adopting a different rule of construction, and therefore said, that in all cases when a pre-existing

debt, or a loan made at the time of the purchase, was the consideration of the deed of conveyance, they would consider the debt as the thing contracted for, and the estate as collateral thereto, by which, the right to redeem, although the day of payment had elapsed, was secured to the vendor. But this rule of construction was only applied to cases where the estate was really intended as security for the payment of money, and not to those, when there was no precedent debt and no loan of money, but an honest design to purchase the property with a condition of repurchase: they were left as at common law. Was this bill of sale intended as a security for the payment of a debt due, or for money lent at the time of its execution? This question must be answered either by the bill of sale or by the proof. The bill of sale contains no recital of the existence of a precedent debt or a loan of money as the consideration, but four hundred and fifty dollars in hand paid, the receipt of which is acknowledged; it is in the usual form, and passes the absolute interest in the slave, and is signed by the complainant. The condition thereto provides, that if the complainant shall pay to the defendant the said sum of four hundred and fifty dollars mentioned in the bill of sale, by the first day of January, 1827, it shall be void. This condition is signed by the defendant, thereby clearly intimating that it was his contract, and not that of the complainant.

It is not pretended that in the bill of sale signed by the complainant there is any evidence of a pre-existing debt or loan at the time of the sale. Is it to be found in the condition signed by the defendants? Chancellor Kent says, in the fourth volume of Commentaries, page 142: "In equity, the character of the conveyance is determined by the clear and certain intention of the parties; and any agreement in the deed, or in a separate instrument, showing that the parties intended the conveyance should operate as security for the repayment of the money, will make it such, and give to the mortgagor a right of redemption." What is there in this condition that shows that the parties so intended it? Is it the word pay? Surely not; for this is just as applicable to a condition of a repurchase, as to a mortgage. There is no acknowledgment of an existing debt or loan; nothing from which either of them can be inferred, and no covenant for repayment of the purchase money; and although a want of a covenant to repay the purchase money is not complete evidence that a conditional sale was intended, yet Chief Justice Marshall, in the case of *Conway's Executors v. Alexander*,

7 Cranch, 237, says: "It is a circumstance of no inconsiderable importance." But it is contended that the word "pay" amounts to a covenant, and that an action would lie upon it.

This argument admits the necessity of the existence of a debt to constitute this transaction a mortgage, and that the mortgagee should have a remedy against the mortgagor; therefore, the existence of the debt is certainly not to be collected from the bill of sale or the condition; and the law is expressly laid down in 4 Kent Com. 445, to be, that a covenant for the payment of the money, inserted in the mortgage, must be express, for that no action will lie on the proviso or condition of the mortgage; and such is the opinion of the supreme court of the United States in the case, before referred to, of *Conway's Executors v. Alexander*. But it is further contended, that it is not necessary, in order to make this a mortgage, that there should be either in the bill of sale or the condition, a covenant of repayment; for which the case of *Lawley v. Hooper*, 3 Atk. 278, is cited. This is unquestionably true, for it has long since been decided that a deed, absolute upon its face, may be declared to be a mortgage upon parol proof, showing that such was the intention of the parties. It certainly is not contended, that this decision supports the position that a conveyance may be declared to be a mortgage, when there is no remedy for the debt against the debtor; that would indeed be to contradict all the authorities on this point. The case from *Atkins*, then, only proves that, though it can not be gathered from the face of the instrument that it is a mortgage, yet parol proof may be heard to show that it was intended as such.

From these considerations it is seen, that to make a deed of conveyance a mortgage upon its face, it must show that the consideration which supports it, was either a debt due or money lent at the time of its execution, or it must contain an express covenant for the repayment thereof; this bill of sale and its condition shows neither of these things, therefore it is not a mortgage upon its face. Then the next inquiry is, does the parol proof show it to have been a conveyance made to secure the payment of money? Most certainly not, but directly the contrary. The testimony of James P. Clark shows, that there was no debt due, no loan of money; that the defendant expressly refused to have any condition for a repurchase if this was to make it a mortgage; that the complainant was informed of this objection; that the agreement was, that there should be a condition of repurchase, and that he was instructed so to pre-

pare the contract by the parties, and that he did so. There is no other testimony on this point, and of course there is no parol proof by which the sale can be converted into a mortgage. We are therefore of opinion, that this was a sale upon condition of repurchase.

The court is aware that sales of this character are watched with a jealous eye, because they may be used as a means of avoiding the statute of usury, and recognize the doctrine of Lord Chaucellor Hardwicke, as established in the case of *Lawley v. Hooper*, that whenever there is the least tincture of fraud or oppression these bargains will be relieved against. But in this case everything appears fair and honest: an adequate price was paid for the negro, and no undue advantages sought or claimed by the vendee. The second point in this case is, does the proof show that the complainant complied with the condition of repurchase, by the payment or tender of payment, of the purchase money within the time prescribed? It is admitted in the answer, and is proved by a witness, that before the time of condition had expired, complainant procured Gleaves to go with him to the defendant, for the purpose of repaying the money, and that they offered to do so, if he would make a bill of sale of the negro to Gleaves, which he refused to do, but expressed a willingness to receive his money, and reconvey to complainant, which was not acceded to; so there was no money paid; neither the proof nor admission of defendant shows that there was an actual tender even upon condition of a conveyance to Gleaves. We are of opinion, that the defendant was not bound by the condition of the bill of sale to reconvey to any person, except the complainant, and that he might well refuse to convey to another, as in every sale of a chattel, there is an implied warranty of title, upon which defendant might possibly have been made liable. We are further of opinion, that in cases of sales, upon condition of repurchase, the tender must be made with all the formalities required by law; at the right time, the right place, and to the right person, for inasmuch as the money is collateral to the property, and the vendee hath no promise either express or implied for its payment, if he refuse to receive it upon a tender properly made, the condition is complied with, and he has no remedy for its recovery: See Litt. sec. 335, and Hargrave and Coke's comments thereon.

For these reasons we are of opinion, that the decree of the circuit court be affirmed.

Decree affirmed.

MORTGAGE OR CONDITIONAL SALE.—In the note to *Chase's case*, 17 Am. Dec. 300, the question, when a deed absolute in form is to be considered a mortgage and when a conditional sale, is considered. The intention of the parties is to govern: *Bennet v. Holt*, 24 Id. 455; *Gillis v. Martin*, 25 Id. 729; *Youle v. Richards*, 23 Id. 722. Although a sale accompanied by an agreement to repurchase will be supported in a proper case, yet the court will watch such agreements and will construe them to be securities, unless a contrary intention is manifest from the circumstances: *Gillis v. Martin*, 25 Id. 729. And in *Colwell v. Woods*, 27 Id. 345, an absolute deed with a covenant by the grantee to reconvey upon the repayment of a certain sum and interest within a year, the grantor remaining in possession, was construed to be a mortgage although it appeared by parol that the parties did not so intend it.

POLK v. FARIS.

[9 YERGER, 209.]

THE RULE IN SHELLEY'S CASE was brought over by our ancestors, formed part of the colonial laws, and until abrogated by statutory enactment, must continue to be law in Tennessee.

THE RULE IS ONE OF PROPERTY AND PUBLIC POLICY, and not of intention or construction. The same is true also in cases of wills, which give rise to the application of the rule.

REASON AND POLICY OF THE RULE considered. Reese, J.

A GIFT OF A SLAVE TO ONE "for and during, and until the full end and term of her natural life; and after the determination of that estate, then to the heirs of the body" of the donee, vests the entire interest in the donee.

WHERE WORDS WOULD RAISE AN ESTATE TAIL IN REALTY, they will give the absolute property in realty.

BILL filed by Agnes Polk, formerly Agnes Brown, and by her husband and their children, setting forth certain facts admitted by the defendants to be true. The facts were: that prior to Agnes' marriage, Elizabeth Strain, her natural mother, since married to Faris, did on the second day of January, 1786, make a gift containing the following language: "That the said Elizabeth Strain, for and in consideration of the natural love and affection which she hath and beareth unto the said Agnes Brown, hath given, granted, and confirmed, and doth give, grant, and confirm unto the said Agnes Brown, one negro wench about eleven years of age, named Phillis; likewise a cow and calf, together with all the issue of the said negro wench, and the increase of the cattle aforesaid. To have and to hold, and to enjoy all and singular the premises aforesaid to the said Agnes Brown, her executors, administrators, and assigns, for and during, and until the full end and term of her natural life; and after the determination of that estate, then to the heirs of the body of the said Agnes Brown, lawfully issuing, and for default

of such issue lawfully begotten, then the said negro wench and her issue, and the cattle and their increase to return to me and my heirs forever. And the said Elizabeth Strain, all and singular, the aforesaid property to the said Agnes Brown and her heirs, lawfully begotten, against all persons whatever, shall and will warrant and forever defend," etc. It was also admitted, as alleged, that shortly before Agnes' marriage, the defendant compelled her to execute a conveyance of her interest in the slave to Faris, by refusing to give consent to the marriage unless the instrument was executed; and the complainant, Agnes' husband, was similarly compelled to execute a bond assenting to Agnes making such a conveyance. The bill prayed the cancellation of the conveyance from Agnes, and of the bond, and the surrender of the slave with her increase. The statute of limitations was relied upon by the defendant. Chancellor Cooke, being of opinion that the absolute interest passed to Agnes by the deed from Elizabeth Strain, and that the statute of limitations had run against Agnes and her husband, dismissed the bill. Whence this appeal was taken.

H. A. Garrett, for the complainant. The chancellor's opinion was based on the rule in *Shelley's case*, which is now condemned by many eminent jurists: *Papillon v. Voice*, 2 P. Wms. 471; *King v. Melling*, 1 Vent. 225; *Legate v. Sewel*, 1 P. Wms. 87; and *per* Lord Mansfield: *Long v. Laming*, 2 Burr. 1107. Its authority is no longer recognized in Pennsylvania: *Findley's Lessee v. Riddle*, 2 Binn. 139 [5 Am. Dec. 355]; and in Connecticut: *Allen v. Mather*, 9 Conn. 114. The intention governs, and "heirs of the body" are to be taken in connection with the intention of the grantor or donor: *Peacock v. Spooner*, 2 Vern. 195; *Daffern v. Daffern*, Id. 362; *Ward v. Bradley*, Id. 23; *Hogsdon v. Bussey*, 2 Atk. 89; *Hobert v. Lord Stamford*, 1 Bro. P. C. 388; *Bagshaw v. Spencer*, 2 Atk. 570; *Long v. Laming*, 2 Burr. 1107; *Warman v. Leaman*, Finch, 279; *Clare v. Clare*, Cas. temp. Talb. 21; *Backhouse v. Wells*, 10 Mod. 181; *Den v. Lile*, 1 T. R. 593. Here the intention is plain. But the word "issue" is always a word of purchase: *Bailey v. Morris*, 4 Ves. 794; *Backhouse v. Wells*, 10 Mod. 181; *Bagshaw v. Spencer*, 3 Atk. 570. Again, if the children of Agnes are entitled to the slaves, the statute of limitations has nothing to do with the case; but even if the estate is absolute in her, defendant can not avail himself of the statute, as Elizabeth covenanted and warranted the title against all persons: *Hays v. Beckerstith*,

Vaugh. 122; Platt on Covenants, 315, 319; Hob. 35; 1 T. R. 671; 2 Sand. 322; 13 East, 72.

B. Tollen and G. S. Yerger, contra. The rule in *Shelley's case*, whatever its origin, was brought over by our ancestors and continues to be law in this state, it never having been abrogated. Whatever doubts may have once existed, it is now well settled that the words "heirs" or "heirs of the body" are so apt and appropriate a description of the whole line of inheritable succession, as not to admit of their being received in a different sense without such distinct and unequivocal demonstration of intention to use them differently as can not be misunderstood: 4 Kent, 228; Hays on Real Estate, 15, 16, 17, 18; 20 Com. L. 512; *Roe v. Bedford*, 4 Mau. & Sel. 362; *Doe v. Harvey*, 4 Barn. & Cress. 610; *Pool v. Pool*, 3 Bos. & Pul. 620; *Jesson v. Wright*, 2 Bligh P. C. 1. In this case there are no such words of explanation. And no word or expression, however strong, that a life estate was only intended to the first taker, will be sufficient to do away the effect of the subsequent limitations; were it otherwise, the rule itself could not exist. For example: where an estate for life is expressly given, and words restrictive of the power of alienation are superadded: *Hays v. Ford*, cited Fearn on Rem. 173, 174; *Perrin v. Blake*, 1 Har. Coll. 283. Or words superadded which give a power to jointure to the first taker: *Rundel v. Ely*, Cart. 170; *Broughton v. Langley*, 2 Ld. Raym. 873; *King v. Melling*, 2 Lev. 78; *Frank v. Stovin*, 3 East, 548. Or where there is an estate for life without impeachment for waste and power to jointure with limitations to trustees to preserve contingent remainders: *Shaw v. Weigh*, 3 Bro. P. C. 130; *Jones v. Morgan*, 1 Bro. C. C. 206; *Papillon v. Voice*, 2 P. Wms. 471; *Bennet v. Tankerville*, 19 Ves. 170; *Coulson v. Coulson*, 2 Atk. 247; *Hodgson v. Ambrose*, 3 Bro. P. C. 416; *Glenorchy v. Bosville*, Cas. temp. Talb. 3; *Den v. Plucky*, 5 T. R. 299; *Langley v. Baldwin*, 1 P. Wms. 759. Or where the limitation is to A. for life only, or for life and no longer: *Robinson v. Robinson*, 3 Bro. P. C. 180; *Doe v. Cooper*, 1 East, 229; *Roe v. Bedford*, 4 Mau. & Sel. 362. The words "in default of issue" have not the effect urged for them; they are found in nearly every case to which the rule in *Shelley's case* has been applied: *Doe v. Harvey*, 4 Barn. & Cress. 610; *King v. Mellish*, 2 Lev. 58; *Platt v. Powlis*, 2 Mau. & Sel. 65; *Ellon v. Eason*, 19 Ves. 73; *Roe v. Bedford*, 4 Mau. & Sel. 362; *Wright v. Pearson*, 1 Eden, 119; *Shelley's case*, 1 Co. 93; *Garth v. Baldwin*, 2 Ves. 646; *Whiting v. Wilkins*, 1 Bulst. 215; *Doe v. Hally*, 8 T. R. 5. We will next

inquire what words have been held sufficient or insufficient to take a limitation "to the heirs of the body" out of the rule. If the limitation is to "heirs" or "heirs of the body" in the plural, superadded words engrafted upon them will not do away their legal effect: *Fearn on Rem.* 178; *Shelley's case*, 1 Co. 93; *Legate v. Sewel*, 1 P. Wms. 87; *Pool v. Pool*, 3 Bos. & Pul. 620; *Hays v. Ford*, 2 Bl. 598; *Wright v. Pearson*, 1 Eden, 119; *Measure v. Gee*, 5 Barn. & Ald. 910; *Goodwright v. Pullen*, 2 Ld. Raym. 1437; *Morris v. Ward*, 8 T. R. 518; *Roe v. Grew*, 2 Wils. 322. Even in cases where the remainder is limited to "issue," which is not *per se* a word of limitation, unless there are superadded words of limitation or other clear explanatory terms, the rule applies in full force: *King v. Mellish*, 2 P. Wms. 472; *Glenorchy v. Bosville*, Cas. temp. Talb. 3; *Robinson v. Robinson*, 3 Bro. P. C. 180; *King v. Burchet*, 1 Eden, 424; *Den v. Plucky*, 5 T. R. 299; *Frank v. Stovin*, 3 East, 548; *Attorney-general v. Suttan*, 1 P. Wms. 734; *Stanly v. Leonard*, 1 Eden, 87; *Doe v. Hally*, 8 T. R. 5. But where there are superadded words of limitation, the word "issue" will be taken as a word of purchase, as in *Loddington v. Kime*, 1 Ld. Raym. 203; *Backhouse v. Wells*, 1 Eq. Cas. Abr. 184; *Mandeville v. Lackly*, 3 Ridg. P. C. 352; *Doe v. Collis*, 4 T. R. 244; *Merest v. James*, 1 Brod. & B. 184; *Barnfield v. Popham*, 1 Eq. Cas. Abr. 183. And in the following cases, where the explanatory words were held sufficient, the modification is clear: *Goodlett v. Herring*, 1 East, 164; *Henry v. Purcel*, Bl. 1092; *Doe v. Ironmonger*, 3 East, 533; *Right v. Cribber*, 5 Barn. & Cress. 856; *Crump v. Norwood*, 7 Taunt. 363; *White v. Collins*, Com. 289; *Seward v. Whillock*, 5 East, 199. It must be then that the absolute interest in the slave was vested in Agnes, and that her claim is barred by the statute of limitations.

By Court, REESE, J. The determination of this cause depends upon the legal effect of the terms used in the deed or bill of sale set forth in the pleadings, which is in the following words. [Here the judge set out the deed as stated in the bill.] The complainants contend that the above deed vests a life estate only in Agnes Brown, and a remainder in the other complainants, her children, as purchasers; that the words "heirs of the body" in the deed, are to be considered and taken, not as words of limitation, but of purchase. On the other hand, the defendant contends that the words used in the deed fall within the extent of the rule in *Shelley's case*; that if the conveyance had been of real estate, the legal effect of the words under the

operation of the rule in *Shelley's case*, would have been to vest Agnes Brown, the first taker, with the inheritance in fee tail, which the statute of 1784, c. 22, sec. 5, would have converted into a fee simple absolute; but that the deed being for personalty, of which an estate tail can not, by law, be limited, the whole interest vested absolutely in Agnes Brown.

Two questions have been discussed: 1. Will full effect be given to the rule in *Shelley's case* in the courts of Tennessee? 2. Does the rule extend to and embrace the present case?

The rule in question was considered in the twenty-third year of the reign of Queen Elizabeth, when upon authority of cases in the year books of the reign of Edward III., and of divers other books, it was held by the lord chancellor of England, and all the judges except one of the *puise* judges, as an acknowledged and ancient rule of law, "that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee or in tail, that always in such cases, the "heirs of the body" are words of limitation of the estate, and not words of purchase: 1 Co. 104.¹ Mr. Preston gives a description or definition of the rule, which Chancellor Kent, a very competent judge of the matter, pronounces to be full and accurate. "When any person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of an intervening estate, of a right of the same legal or equitable character, to his heirs or heirs of his body, as a class of persons to take in succession, the limitation to the heirs entitles the ancestor to the whole estate:" 1 Preston on Estates, 263.

As a ground why full effect should not be given in Tennessee, to this rule, it has been argued that it had its origin in the policy of the feudal system, when that system was in full vigor. It is alleged to have been founded upon reasons which have now, even in England, but little strength, and which in the United States never existed, in which the rule is said not to be in harmony with our institutions; and it is contended that the reasons in which the rule originated having ceased, the rule itself should cease with them. The current indeed of professional opinion in England seems to be, that the rule had its origin in feudal policy, the incidents of wardship, *primer seisin*, relief, etc., making estates taken by descent more beneficial to

1. *Shelley's case*.

the lord, than estates taken by purchase. It is remarkable, however, that Justice Blackstone, in his celebrated argument in the case of *Perrin v. Blake* in the exchequer chamber, says that in no feudal writer did he ever find a single trace of such reason assigned. That learned judge was inclined to believe that it was first established to prevent the inheritance from being in abeyance. One principal foundation for it, he says, was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance. Another foundation he said might be, and probably was, laid in a principle diametrically opposite to the genius of the feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. To make this latter reason probable, he cites from the year books, the very first case in which, as he believed, the principle of the rule in *Shelley's case* had been established. It is so early as 18 Edw. II. (folio 577), where A. purchased the manor of F., to hold to himself and wife and his oldest son, and the heirs of the body of the son, and if he died without heirs of his body, then to remain to the right heirs of A., the father. The son died without issue in the father's lifetime. The father became bound in a statute merchant and died, leaving another son his heir. To a writ sued out extending the lands of A. upon the estate, the sheriff returned that he had delivered all the lands which A. had in fee, except the manor of F., in which he had only an estate for term of life. Upon this return it was argued that A. took only an estate for life, the fee simple being limited to his heirs, who took by purchase, but the court held the contrary; for this reason among others, because otherwise the fee and the right after the death of the eldest son, would have been in nobody. And Justice Blackstone concludes that the rule was of the highest antiquity, not merely grounded upon any narrow feudal principle, but applied in the very first instance we know of, to the liberal and conscientious purpose of facilitating the alienation of land by charging it with the debt of the ancestor: See *Fearne on Rem.* 85, 86; 1 *Harg. Law Tracts*, 499, 500.

If the rule were, however, exclusively of feudal origin, its authority would not be thereby diminished, nor would that circumstance justify courts of justice in withholding obedience to it, or in refusing to give to it, its full effect. For as is justly remarked by the same learned judge last referred to, "there

is hardly an ancient rule of real property but what had in it more or less of a feudal tincture, but whatever their parentage, they are now adopted by the common law of England, incorporated into its body, and so interwoven into its policy, that no court of justice in the kingdom had either the power or (he trusted) inclination to disturb them." Whatever may have been the origin of the rule, or how well soever it may seem adapted to attain the selfish objects, or gratify the grasping cupidity of the feudal lord, it happens to have been obviously based also upon principles of public policy and commercial convenience, sufficiently broad and deep to cause it to survive for the period of near five hundred years, the rage of legislative innovation, and all the changes and fluctuations of the most eventful era of the world, and still to challenge the willing obedience and enlightened support of the most learned and able minds of Great Britain and the United States. It is a rule or canon of property, which so far from being at war with the genius of our institutions, or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing perhaps to this circumstance that the rule, a Gothic column found among the remains of feudality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system. The statute of entailments, passed in the thirteenth year of King Edward I. (1285), commonly called the statute *de donis*, recites that, "where one giveth land to another and the heirs of his body, it seemed very hard to the grantors and their heirs, that their will expressed in the grant should not be observed; instead of which after issue born, the grantee had power to alien his land, contrary to the mind of the giver, and contrary to the form of the gift." The statute then ordained, "that the will of the giver, according to the form of the deed of gift manifestly expressed, should be observed, so that those to whom the land was given under such condition shall have no power to alien the land so given, but it shall remain with the issue of them to whom it was given, after their death, or shall revert to the donor or his heirs, if issue fail."

This statute would have locked up all lands in the kingdom from creditors, from commerce, and from all the purposes of society. But the fictitious action of common recoveries, and the rule in *Shelley's case* afterwards adopted, had some tendency to knock off the fetters created by this statute. And finally, our

statute of 1784, c. 22, sec. 5, coming in aid of the policy of those fictitious actions and of the rule in *Shelley's case*, put an end to the effect and operation of the statute *de donis*. It recites that, "Whereas, entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances, the source of great contention and injustice, be it enacted, etc., that from and after the ratification of this act, any person seised or possessed of an estate in general or special tail, whether by purchase or descent, shall be held and deemed to be seised and possessed of the same in fee simple, fully and absolutely, without any condition or limitation whatsoever, to him, his heirs and assigns forever, and shall have full power and authority to sell and devise the same as he shall think proper; and said estate shall descend under the same rules as other estates in fee simple." This statute, like the rule in *Shelley's case*, is a rule, not of intention or construction, but of property, and like it has relation not to the wishes of the donor, but to the interests of the community; both alike tend to control individual purpose for the attainment of a public object, namely, the unlocking of property and the subjecting it to the uses of society. But if we are mistaken in supposing that the rule in its intrinsic merits has even more to commend it to the cheerful obedience and entire approbation of the people of the United States, than to those of Great Britain, where it has been so uniformly and so stanchly maintained, still, as our ancestors brought the rule with them across the Atlantic, and it formed an element of our colonial law, it must continue until abrogated by statutory enactment to constitute a portion of our general body of laws, and as much exacts obedience, and must be carried as fully into effect, as any other principle of the common law which we have adopted. If the reasons upon which the rule was originally founded had indeed ceased, it would not follow that the rule itself should likewise cease. For, as Mr. Fearne correctly remarks: "Where those things which are the objects of any rule of law cease to exist, there the rule itself must of necessity cease for want of subject-matter to relate to, or have any effect upon it; but it by no means follows, that where the same objects of a law still continue, that there the law should cease, only because the very state of things which was the first occasion of it no longer exists. The conclusion is, that every rule of law once established continues to be so, whilst the sub-

ject of it exists, until altered by solemn act of legislation:" *Fearne on Rem.* 88.

Chief Justice Dorsey, 4 Har. & J. 431,¹ speaking of the rule in *Shelley's case*, and of the argument against it now under consideration, very forcibly remarks: "That to disregard rules of interpretation sanctioned by a succession of ages, and by the discussions of the most enlightened judges, under pretense that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction, boundless in its range and pernicious in its consequences." That views so just and enlightened have generally prevailed is shown by the uniform adoption and enforcement of the rule in the courts of the different states of the union. For which see 4 Kent Com. 421, etc., and the cases there cited. We proceed now to inquire whether the terms and limitations of the deed from Elizabeth Strain to Agnes Brown, fall within the extent and operation of the rule in *Shelley's case*? If this deed were a conveyance of real estate, the question would be too plain to admit of debate, or to be susceptible of illustration. In its terms it falls literally within the rule. It contains a distinct limitation to Agnes Brown for life, with remainder to the heirs of her body lawfully issuing, and in default of such issue, to the grantor or her heirs. We hazard nothing, it is believed, in asserting that no case of a deed or common law conveyance for real estate, with terms similar to those of the deed before us, has by any court in England, been excluded from the extent and operation of the rule in *Shelley's case*, from the time that rule was adopted up to the present moment. We have already indicated our opinion that the rule in question is a rule of property and of public policy, not of intention merely, or construction.

By this it is not meant to assert that the intention of the grantor is to be altogether excluded as to the entire instrument, in fixing upon it a construction or interpretation. But it is intended to assert that it matters not how distinctly in point of intention it may appear, that the grantor meant that the first taker should have a life estate only; if it further appear, that by the use of the terms, heirs of the body, issue, sons, children, etc., he meant the descendants of the first taker should take, in their character of heirs, a descendible estate of inheritance, exhausting the lineal stock of the first taker; such

1. *Horne v. Lyeth*.

purpose, by operation of the rule, vests the first taker with the inheritance. In other words, it matters not how strongly or how clearly the grantor may intend that the instrument should not be controlled by the rule of law, yet if the proper construction of the terms which he has used in the entire instrument bring it within the operation of the rule of law, the rule of law and not his intention must have effect. So under our statute of 1784, c. 22, sec. 5, it would matter not how clearly the grantor might intend to create an estate tail and not a fee simple, yet the statute which is a rule of property and of public policy, would have effect against such intention of the grantor, and the estate, in the language of the statute, would be held and deemed, not a fee tail, but a fee simple absolute. The many vexed questions which have from time to time arisen in the application of the rule, and much of the obscurity and apparent contradiction in the decisions of the courts upon the subject, have probably proceeded from a want of uniform attention to this distinction, or of a just application of it.

In wills especially, where intention has always been favorably regarded, and been permitted to exert a controlling influence, the courts have, perhaps, sometimes erred in not sustaining the rule with sufficient firmness against the presence of supposed intention. The general description of circumstances, in cases of wills, that have been allowed to repel the influence of the rule, are thus summed up by Justice Blackstone, in his celebrated argument before referred to, in *Perrin v. Blake*, in the exchequer chamber: "All the cases that had occurred from the statute of wills to that time (a period of above two centuries), in which the heirs of the body had been construed to be words of purchase, were reducible to these four heads: either where no estate of freehold was given to the ancestor, or where no estate of inheritance was given to the heir, or where other explanatory words were immediately subjoined to the freehold estate; or lastly, where a new inheritance was grafted on the 'heirs' of the body:" 1 Harg. Law Tracts, 507.

In the deed before us, none of these circumstances occur. Mr. Hargrave, in his able remarks upon the rule in *Shelley's case*, 1 Harg. Law Tracts, 562, 577, says: "If the party entailing meant to build up a succession of heirs on the estate of the tenant for life, he would apply the rule, even though the party should express in his will that the rule should not be applied, and should further express, that the remainder to the heirs of the tenant for life should operate by purchase." Mr. Fearn,

in commenting upon this observation, remarks, that it might at first glance be thought to bear against the leading principles in the construction of wills, namely, the intention of the testator; but he adds, upon examination this appears to be only in effect striking the balance between two incompatible intentions; the one that the whole line of heirs, and those only, shall take, the other that they shall take by purchase: *Fearne on Rem.* 191. In the case of *Perrin v. Blake*, the court of the exchequer chamber, in their judgment, struck the balance in the same way, between incompatible intentions. In that case, the limitations were, to A. for life, remainder to the heirs of the body of A., remainder to testator's daughters for their lives, etc. And the testator declared it to be his intent that A. should not sell or dispose of his estate for a longer term than his life, and to that intent devised it to A. for life, remainder to B. and his heirs during the life of A. The court determined that A. was tenant in tail, and yet it was beyond all doubt, that the testator intended he should have a life estate only. Mr. Hays, in his essay, remarking upon this case, observes, "That it was pending above thirty years, yet the simple question was, whether the testator had indicated an intention to designate individuals under the term 'heirs.' He unquestionably meant objects to take by purchase, but unless he meant other objects than heirs, A. was beyond all dispute, tenant in tail. The superadded declaration was quite consistent with an intention to use the word heirs in its proper sense."

So also in the case of *Jones v. Morgan*, 1 Bro. C. C. 206. The gift was to A. for life, without impeachment of waste, to the heirs male of the body of A., severally and respectively and in remainder, the one after the other, as they and every of them shall be in seniority of age and priority of birth, with remainder over. There were powers to A. to lease and jointure and charge with portions. All these accumulated circumstances tended strongly to show, indeed left no doubt, that the testator's intention was, that A. should have a life estate only. Yet he was adjudged by operation of the rule, to be tenant in tail, and vested with the inheritance. Lord Chancellor Thurlow, who determined the cause, observes: "It is immaterial that the testator meant the first estate to be an estate for life. I take it, that in all cases the testator does mean so. I rest it upon what he meant afterwards. If he meant that every other person who should be his heir, should take, he meant what the law would not suffer him to give, or the heir to take as a purchaser.

All possible heirs must take as heirs." So prevalent is the influence of this general intention when expressed, that the issue shall take as heirs, that even the word "son," which is properly a word of purchase, if used so as to prove that the testator meant a class to take in succession as heirs, will be construed a word of limitation, and vest the inheritance in the tenant for life, as in the case of *Robinson v. Robinson*,¹ determined in the house of lords, 3 Bro. P. C. 180. The gift was to A. for life, and no longer, provided he took the testator's name of R., and lived in testator's house at B., with remainder to such son as he shall have lawfully to be begotten, taking the name of R., and for default of such issue, then over, etc. The decision was that A. was tenant in tail; and the ground of the decision was, that the word son as used, was *nomen collectivum*, and equivalent to heirs male of the body, which let in the rule in *Shelley's case*. Here it was not necessary to take away the force of any technical words of fixed meaning, such as "heirs of the body," but merely to put a plain construction on the words which the testator had actually used.

So, also, in the great case of *Jesson v. Wright*, 2 Bligh's Cases in the House of Lords, 1. The gift was to A. for life, he keeping the building in tenantable repair, to the heirs of the body of A. in such shares and proportions as he, by deed or will, shall appoint, and for want of appointment, then to the heirs of the body of A., share and share alike, as tenants in common, and if but one child, the whole to such child, and for want of such issue, over, etc. It was held in the house of lords, that A. was tenant in tail and vested with the inheritance. In that case, Lord Eldon, then chancellor, remarks: "If the words children and child, are so to be considered as merely within the meaning of the words 'heirs of the body,' which words comprehend them and other objects of the testator's bounty (and I do not see what right I have to restrict the meaning of the word 'issue,') there is an end of the question. I do not go through the cases. Upon the whole, I think it is clear that the testator intended that all the issue of the first taker should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary, because when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is more important to maintain the rules of law than to provide against the hardships of particular cases." Lord Redes-

1. *Robinson v. Hicks*.

dale, in the same case, in his usual luminous and direct manner, remarks, "that it is dangerous where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. In this case it is argued that the testator did not mean to use the words 'heirs of the body,' in their ordinary legal sense, because there are other inconsistent words. But it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe v. Goff*,¹ decide that the latter words, unless they contain a clear expression or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties; but look to the words used in the will. The words 'for want of such issue,' are far from being sufficient to overrule 'heirs of the body.' They have almost constantly been construed to mean an indefinite failure of 'issue,' and of themselves, have frequently been held to give an estate tail."

After the citation of authorities so strong and decisive, it is scarcely necessary to remark, that the words in the deed before the court, "after the determination of that estate, then," etc., relied on in argument to change the legal effect of the words, "heirs of the body," from words of limitation to words of purchase, have not the slightest tendency to produce such result. Indeed, it would be doing violence, not only to the fixed and obvious meaning and legal effect of the terms "heirs of the body," if held in this case to be words of purchase, but to the general intention of the grantor, to be collected from the other portions of the instrument, and arising also from the fact, that Agnes Brown, the first taker, was, at the time the deed was made, not more than two or three years of age, and the grantor therefore would probably look to the heirs of her body as a class to take as heirs, and could hardly be supposed to look to a portion of them, to wit, children living at a particular time, as individuals, the special objects of her bounty. This case, indeed, is so clear of all difficulty upon the words of the instrument, as not to have merited the attention which has been bestowed upon it, except for the reason that it is the first case in

1. 11 East, 666.

this state which has distinctly brought up the rule in *Shelley's case* for discussion, and the determination of which must necessarily be placed exclusively upon that rule. It were useless, however, to go further into the cases. They are very numerous, and must be familiar to that portion of the profession who have directed their researches into this branch of legal learning. Those cases, too, have received the most severe and elaborate analysis from minds as subtle and powerful as ever adorned the profession, or illustrated the science of law.

But it has been urged that however correct might be the view of the subject which has been taken, if the deed before the court were a conveyance of real estate, yet, as it is for personal property, the rule in *Shelley's case* will not apply to it. But by a well-settled principle of the common law, the limitation of personal estate to one in tail vests the whole in him: *Fearne on Rem.* 463. In 2 *Roper's Treatise on the Law of Legacies*, 393, it is laid down as a principle, that "if personal estate be given by testament to A., and the heirs of his body, as such words would create an express estate tail in freehold lands, if applied to them, so in personal estate, if applied to it, such words will have the effect to vest the absolute interest, because such property can not be entailed; therefore, the first taker will take the absolute interest in the bequest, and the remainder or executory limitations to the heirs of the body, and the subsequent limitations, if any, depending upon the failure of them, will have no effect. It will make no difference in regard to the construction, that the interest or profits only are given to the first taker, and the principal to the heirs."

This principle is proved by many cases: See *Scale v. Scale*,¹ 1. P. Wm. 290, and also, *Dod v. Dickerson*, 8 Vin. 451, and the case of *Butterfield v. Butterfield*, 1 Ves. sen. 133, 134. Where a testator by his will devised that four hundred pounds should be put out on good security for his son T., that he might have the interest of it for his life, and for the lawful heirs of his body; and if it should so happen that he should die without heirs, it should go to testator's youngest son J. B., Lord Hardwicke decided that the whole vested in the first taker, and the limitation over was too remote. In the case of *Daw v. Lord Chatham*, 1 Madd. 488;² 1 Meriv. 278,³ and 5 Bro. P. C., 450,⁴ the same point is decided, although in that case the devise to the first taker was only of the dividends and payments of stock and annuities, and of the use of furniture during life.

1. *Scale v. Scale*.

2. *Todd v. Pitt*.

3. *Brauncker v. Bagot*.

4. *Todd v. Pitt*, 7 Bro. P. C. 453.

In the case of *Chandos v. Price*,¹ 3 Ves. jun. 99, Lord Eldon, remarking upon the above case, says: "In *Daw v. Lord Chatham*, the whole contemplation of the argument in support of the decree of the lords commissioners, was that the rule in *Shelley's case* could not apply to a bequest purely of personal property. The distinction taken by lord Talbott in *Atkinson v. Atkinson*, 3 P. Wms. 258, that where the words would give an express estate tail, the construction of law must obtain, but where only an implied estate tail, it should not, was very much labored in *Daw v. Lord Chatham*. For in that case there was manifestly an express estate for life, and there were circumstances to show how anxiously the testator endeavored to restrain it to an interest for life; from the manner in which the question was left to the judges and from some notes, I have concluded that the distinction is exploded; and that it is to be taken as a general rule, that where the words would raise an estate tail in real estate, they will give the absolute property in personalty, and if there is no distinct expression to restrain it to the time the law allows, this consequence must prevail, whatever is the intention." In the same state (South Carolina) in which the deed of gift before the court was made, and in which the parties to this suit resided until recently, the case of *Dott et al. v. Cunningham*, 1 Bay, 453 [1 Am. Dec. 624], was decided, founded upon a deed for personal property, in its terms very like the present. A special verdict stated that "Sarah Baker, by deed poll, gave her daughter, Sarah Dott (wife of David Dott), sundry negroes, etc., distinct from her husband, during life, and at her death to the heirs of her body; that Mrs. Dott then had issue the plaintiff, her eldest son, and several other children, and soon after her husband, David Dott, died, and she afterwards married John Fyffe, and that after the marriage, the said Fyffe and his wife, viz., in 1776, sold part of the negroes in question to the defendant, Cunningham." The special verdict then submits the points of law to the court, whether Mrs. Dott had a life estate only in the negroes, with a limitation over on her death, or whether the whole vested in her at first. The case was fully argued before Rutledge, C. J., Burke, Grimke, Waties, and Bay, JJ., who were unanimously of opinion, that the words, "at the death to the heirs of her body," were words of limitation and not words of purchase; that the court must be governed by the plain rules of law, and the legal import of the phrases which constitute an estate tail,

1. *Chandler v. Price*.

which being too remote and tending to a perpetuity of a chattel, the whole vested in Mrs. Dott, the first taker.

There are many other American cases which apply and give effect to the rule in *Shelley's case* to devises and conveyances of personal property. Upon the whole, therefore, we feel very clear that the gift from Elizabeth Strain to Agnes Brown for life, with remainder to the heirs of her body, vested the entire interest in Agnes Brown; and therefore, that the statutes of limitation have barred the right of the complainants. The decree of the chancellor, which dismissed the bill, must consequently be affirmed.

GREEN, J. I fully concur with the result of the foregoing opinion; but I adhere to the views expressed by me in *Loving v. Hunter*,¹ as to the reason and policy of the rule in *Shelley's case*.

Judgment affirmed.

THE RULE IN *SHELLEY'S CASE* has ceased in a great measure to control the disposition of property in this country. Only in a few states is this much-celebrated principle preserved. Statutory enactments in nearly all of them have declared that where remainders are limited to the heirs of tenants for life, the heirs are to take as remainder-men, and that their ancestors are not to have the whole estate. In some instances the rule in *Shelley's case* is abolished only in cases of wills, as in New Jersey: Stat., tit. 10, c. 2, sec. 10; *Akers v. Akers*, 23 N. J. Eq. (8 C. E. Green) 26, 30; *Zabriskie v. Wood*, Id. 541; New Hampshire, Gen. Stat., c. 174, sec. 5; Oregon, Gen. Laws, 940, sec. 28; Ohio, Rev. Stat., c. 122, sec. 53; *Carter v. Reddish*, 32 Ohio St. 1; Rhode Island, Gen. Stat., p. 373, sec. 2. Whereas, in the greater number of states, it has been wholly discarded: Alabama, Rev. Code, sec. 1574; *Mason v. Pate*, 34 Ala. 379; *Williams v. McConico*, 36 Id. 22; California, Civil Code, sec. 779; Connecticut, Gen. Stat., p. 352, c. 6, tit. 18, sec. 4; *Goodrich v. Lambert*, 10 Conn. 448; Dakota, Rev. Code, sec. 236; Kansas Comp. Laws, p. 1007, c. 117, sec. 52; Kentucky, Rev. Stat., c. 80, sec. 10; *Williamson v. Williamson*, 18 B. Mon. 329; *Foster v. Shreve*, 6 Bush, 519; Maine, Rev. Stat., c. 73, sec. 6; Massachusetts, Gen. Stat., c. 89, sec. 12; *Putnam v. Gleason*, 99 Mass. 454; *Pike v. Stephenson*, Id. 188; *Hatfield v. Sohier*, 114 Id. 48; Missouri, Gen. Stat., c. 108, sec. 6; *Wommack v. Whitmore*, 58 Mo. 448; Michigan, 2 Comp. Laws, p. 1327, sec. 28; *Fraser v. Chene*, 2 Mich. 81, 93; Minnesota, 1 Stat. at Large, p. 615, sec. 28; New York, 2 Rev. Stat., p. 1102, sec. 28; *Brown v. Lyon*, 6 N. Y. 420; Tennessee, Code, sec. 2006; Virginia, Code, c. 116, sec. 11; West Virginia, Code, c. 71, sec. 11; Wisconsin, 2 Stat., p. 1124, sec. 28. In Vermont it is regarded as of no special force except as a rule of construction and intention: *Blake v. Stone*, 27 Vt. 475; *Smith v. Hastings*, 29 Id. 240; *Austin v. R. R. Co.*, 45 Id. 215.

In some of our state courts recent adjudications affirm the existence of the rule in *Shelley's case* as a rule of property: *Doe v. Jackman*, 5 Ind. 283; *Small v. Howland*, 14 Id. 592; *Hull v. Beale*, 23 Id. 25; *Siccloff v. Redman*, 26 Id. 251; *Andrews v. Spurlin*, 35 Id. 262; *Gonzales v. Barton*, 45 Id. 295;

Smith v. McCormick, 46 Id. 135; *Baker v. Scott*, 62 Ill. 86; *Butler v. Huestis*, 68 Id. 594; *Thomas v. Higgins*, 47 Md. 439; *Josetti v. McGregor*, 49 Id. 202; *Kepple's appeal*, 53 Pa. St. 211; *Doebler's appeal*, 64 Id. 9; *Kleppner v. Laverty*, 70 Id. 70; *Yarnall's appeal*, Id. 335; *Kinsel v. Ramsay*, 87 Id. 248; *Daley v. Koons*, 90 Id. 246; *Brooks v. Evetts*, 33 Tex. 732; *Pressgrove v. Comfort*, Sup. Ct. Miss., 11 The Rep. 846; *Robert v. West*, 15 Ga. 122; *Wayne v. Lawrence*, 58 Id. 15. Even with these the rule is not in all cases strictly enforced. For example, in Illinois, the legislature, manifesting that dislike for entails which prevails in this country, has enacted that in estate tails the first taker is to have a life estate, and the second taker a fee simple absolute. Therefore, when a devise is made to A. for life, with remainder over to the heirs of his body, the statute supersedes the rule in *Shelley's case*, which in other respects is in force in that state, and makes the heirs of A.'s body purchasers under the devise: *Butler v. Huestis*, 68 Ill. 594. Under statutes abolishing estates tail, a conveyance which would have vested an estate tail in a grantee under the rule in *Shelley's case* at common law, is construed to give a fee simple: *Andrews v. Spurlin*, 35 Ind. 262; *Yarnall's appeal*, 70 Pa. St. 335.

The Pennsylvania decisions seem, in other respects, to preserve the rule in all its rigor. The intention of the testator is disregarded unless unequivocally manifested to be in conflict with the intent presumed by the rule in *Shelley's case*. An example of such an unequivocal manifestation of the intent appears in *Daley v. Koons*, 90 Pa. St. 246. It is said in *Kleppner v. Laverty*, 70 Id. 70, 73: "The particular intent must give way to the general one. The rule in *Shelley's case* is not a rule of construction—not a means of ascertaining the intention of the testator. It presupposes that intention to be ascertained. It is a rule of law which declares inexorably that where the ancestor takes a preceding freehold by the same instrument, whether deed or will, a remainder shall not be limited to his heirs as purchasers." And Judge Agnew, in *Yarnall's appeal*, 70 Pa. St. 335, 340, after quoting the fundamental principle that the intention of the testator is the guide for the interpretation of wills, explains that "the rule in *Shelley's case* is only an apparent, not a real exception to the statement. It sacrifices a particular intent only to give effect to the main intent of the testator." In Maryland, *Thomas v. Higgins*, 47 Md. 439, 450, so imperative are the requirements of the rule said to be when it is applicable, "that it will control the operation of the grant and vest the whole estate in the ancestor, though the instrument declares he shall only have a life estate." On the other hand, in Indiana, *McCray v. Lipp*, 35 Ind. 116, 120, the rule is pronounced "not inflexible when applied to devises. It yields to the manifest intention of the testator." And so in *Brooks v. Evetts*, 33 Tex. 732.

The following expressions have been held to bring the case within the rule as existing in the above-mentioned states of the union: to M. J. W. "during the term of her natural life, and from and after her decease, then to the use and behoof of the heirs of the body of the said" M. J. W.: *Wayne v. Lawrence*, 55 Ga. 15; the rents and profits of certain property to S., "the principal to descend to her heirs:" *Baker v. Scott*, 62 Ill. 86; to one and his heirs, or to one for life, remainder to his heirs: *Hull v. Beals*, 23 Ind. 25; to one "to be for his use during his life, and then to fall to his heirs:" *McCray v. Lipp*, 35 Id. 116; to C. "during her life-time, and after her death to descend to the heirs of her body:" *Andrews v. Spurlin*, Id. 262; to M. "for and during her natural life, and from and after his decease to his lawful issue:" *Gonzales v. Barton*, 45 Id. 295; to daughters "on the express condition and understanding that they are

to enjoy and use the eight thousand dollars bequeathed to each of them during their natural lives, and at their death to revert and descend to the heirs of their body:" *Smith v. McCormick*, 46 Id. 135; to D. and W. "as tenants in common, during the natural life of each of them, remainder to the heirs of the body," and "in default of such issue:" *Thomas v. Higgins*, 47 Md. 439; *Josetti v. McGregor*, 49 Id. 202; to one "during his natural life, and then to his lawful heirs:" *Fulton v. Harman*, 44 Id. 251; "for and during the term of his natural life, and after his decease to his eldest son:" *Simpers v. Simpers*, 15 Id. 160; to one "during her life," and then "to her eldest male heir:" *Brownell v. Brownell*, 10 R. I. 509; to one "in trust and for the use of his heirs at law:" *Kepple's appeal*, 53 Pa. St. 211. But the words "child" or "children," "son," "daughter," are regarded as words of purchase generally: *Doe v. Jackman*, 5 Ind. 283; *Haldeman v. Haldeman*, 40 Pa. St. 29; though in the latter case, as well as in *Yarnall's appeal*, 70 Id. 70, it is shown that "child" or "children" may be words of limitation, and in *Simpers v. Simpers*, 15 Md. 160, a similar construction was placed upon the word "son."

Where the rule is in force, it applies as well to personalty as to realty. Such was the conclusion reached in the principal case, and it is supported by *Mason v. Pate*, 34 Ala. 379; *Smith v. McCormick*, 46 Ind. 135; *Pressgrove v. Comfort*, 11 The Rep. 846, Sup. Ct. of Miss., May, 1881.

But this once important principle in the disposition of estates has been almost wholly legislated away in this country, and greatly altered by statute even in England. A very carefully prepared note of Randolph & Talcott in the fifth American edition of Jarman on Wills, vol. 3, p. 99 *et seq.*, illustrates the part the rule has played in American jurisprudence. But Chancellor Kent, 4 Com. 233, note, long since recognized the law on this subject as possessing more historic interest than practical value, and offered his treatment, not so much as a discussion of a still vital question as "a humble monument to the memory of departed learning."

CAMPBELL v. STATE.

[9 YERGER, 333.]

IT WILL BE PUTTING A MAN IN JEOPARDY when, having been found guilty on one of three counts, he moved for a new trial, and is put again on trial on all three counts; and if on such second trial he is acquitted on the count upon which he was before found guilty, he will be entitled to be discharged.

INDICTMENT for larceny. The case appears from the opinion.

P. Lea and R. M. Anderson, for the plaintiff in error.

Geo. S. Yerger, contra.

By Court, GREEN, J. It is insisted for the plaintiff in error, that as he was found not guilty as charged in the first and third counts of the indictment on the first trial, and on the second trial, he was found not guilty as charged in the second count, that he has been acquitted of the whole charge; that the trial

the second time, upon the first and third counts, was against the constitution and laws of the land, and that he is entitled to be discharged from the prosecution. The attorney-general admits, that it is against law to try and punish a party for an offense, of which he has been acquitted on a former trial; but he contends, that the verdict of the jury was an entire thing, and that the court could not set it aside in part without setting it aside altogether; and that as the new trial was granted upon the application of the plaintiff in error, in order to afford him the benefit which he sought, he was necessarily deprived of the verdict in his favor upon the first and third counts of the indictment.

An indictment is a written accusation of one or more persons, of a crime, presented upon oath by a jury of twelve or more men, termed a grand jury: 1 Chit. Crim. L. 168. It is frequently advisable to insert two or more counts in an indictment: Id. 248. But every separate count charges the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses, that the joinder of counts is admitted: Id. 249. In point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender: Id. 253. And several persons may be joined in the same indictment, charged in separate counts, with distinct offenses; but they must be of the same nature, and such as will admit the same plea, and the same judgment: Stark. Crim. Pl. 48; 2 Hale, 174; 8 East, 46.¹ In all these cases of joinder, whether of different offenders or of different offenses against the same individual, the jury may find a verdict of guilty upon some of the counts, and not guilty upon others: 1 Chit. Crim. L. 638, 640, 641. It is well settled, that where several defendants are tried at the same time, and some are acquitted and some convicted, the court may grant a new trial as to those convicted, without being under the necessity of setting aside the entire verdict: Tidd, 820; 6 T. R. 619.²

The establishment of this proposition defeats the argument upon which the attorney-general mainly relies; and by showing that the verdict may be set aside in part, and as to part remain in force, and that this will be done, where different defendants may have been joined, and some were acquitted and some convicted, there can be but little difficulty in coming to a correct conclusion in this case. We have seen that every count of an indict-

1. *King v. Kingston.*

2. *King v. Mawbey.*

ment contains a charge of a distinct offense, and that it is upon the principle of joinder of offenses, that the joinder of counts is admitted. When, therefore, a party is acquitted of the charge in one count of the indictment, he is clear of that charge forever. He can no more be brought in jeopardy upon that charge again, than if it were the only count in the indictment. In the case of *King v. Mawbey*, 6 T. R. 638, there was no question but that a defendant in a criminal case, who had been acquitted, could not be tried a second time. The only difficulty was, whether as those acquitted could not be again tried, those who were convicted could be relieved, however unjust the verdict. The attorney-general argued that they could not, because the verdict was an entire thing, and could not be set aside in part. All the judges, however, in delivering their judgment, decide, that a new trial may be granted to those who were convicted, although the others could not be tried again. Now where is the difference between that case and the one under consideration? The same principle regulates the joinder of counts charging different offenses against the same person, and counts charging different persons. Does it not seem to follow, that the consequences of a like finding should be similar? But it is said that in this case, the entire verdict was in fact set aside, and that as this was done upon the application of the defendant, he gave up his right to a judgment of acquittal upon the first and third counts, in order to get the benefit of another trial upon the second, and that he can not now object that he was tried upon the whole indictment.

It is not necessary to determine how far a party could be held to even an express waiver of the benefit of a verdict of acquittal. It is enough that in this case, he has not done so. He moved for a new trial. We are not to suppose his application was more extensive than his necessities. As he had been acquitted upon two counts, he could have no motive to ask for another trial, except upon the one on which he was found guilty; and we are not to understand his application as going farther. But the record shows that the judge in granting the new trial, set aside the verdict. This was error; it improperly revived the proceedings upon those counts on which he was acquitted. In England, when a new trial is granted in favor of two defendants, who have been convicted, while others have been acquitted, in order to prevent the revival of proceedings against the latter, there are two methods which may be adopted, the first of which is, to alter the original *venire* so as to make it embrace those

only who have been convicted; and the other is, to make an entry on the record, that the verdict was improperly taken against those who were convicted, and then to award a new trial, as far as they are concerned: 1 Chit. Crim. L. 660; 6 T. R. 626. So in this case, the judge should have made an entry on the record that the verdict was improperly taken against the defendant on the second count, and as to that count, he should have awarded a new trial. Had this been done, the proceedings upon the other two counts would not have been revived. But although they were improperly revived, it was error to try the defendant a second time upon them. Every count charges a distinct offense. Having been once tried upon all the counts and acquitted of some of them, to try him again upon the same counts would be putting him in jeopardy a second time for the same charge, contrary to the tenth section of the bill of rights.

Suppose a party were charged in the same court, in three separate indictments, with three distinct offenses, and to save time and trouble it were agreed that they should be joined, and that he should be tried in all the cases at the same time. If the jury in such case were to acquit him of two of the charges, and find him guilty of the third, and upon his application, a new trial were awarded, would it ever be thought that he could be tried again upon the charges of which he had been acquitted? Surely not; and yet the case before the court is the same in principle. Each of these counts charged a distinct offense. Upon the third count, the defendant has been heretofore tried and acquitted. The present conviction and judgment are therefore erroneous, and must be reversed, and the defendant discharged.

Judgment reversed.

IN JEOPARDY.—For a discussion of the meaning of this expression, see *State v. McKee*, 21 Am. Dec. 499 and note; *Nugent v. State*, 24 Id. 746; *State v. Cooper*, 25 Id. 490.

KIRBY v. STATE.

[9 YERGER, 383.]

ON A TRIAL FOR MURDER, evidence that the deceased, the day before he was killed, stated that he was going on a certain trip, and that the defendant was to accompany him, is inadmissible.

INDICTMENT for murder. The case appears from the opinion. Verdict of guilty. Writ of error was sued out.

Charles Scott, for the plaintiff in error.

S. Turney and J. R. McCormick, contra.

By Court, GREEN, J. We are of opinion that the evidence of Baker was illegal and was improperly received. When this case was before the court upon a former occasion, 7 Yerg. 259, the evidence of this same witness constituted one of the grounds assigned for error. In that case this court thought that the testimony was competent, but the evidence in the record now before us, differs materially from that of the same witness as presented in the record then before the court. In that case, the evidence of Baker as quoted in the opinion of the court, was, "that Elrod told him at Sparta the evening before the day on which he was missing, that he was going the next day to the pine mountain, to hunt a saltpeter cave." According to this statement, Elrod was at Sparta on his way to the mountain, and he stated to the witness that he was going there and the purpose for which he was making the journey. The court held, and we think correctly, that this statement setting forth the place to which he was going, and his intention in going there, was part of the transaction, and as such was admissible. But Baker's evidence as set forth in the present record, goes much farther than this. In addition to the statement of his own purpose in his journey, he told the witness that he was to go with the defendant next day to the pine mountain, and that the defendant was to show him a saltpeter cave. Now how does this statement constitute any part of the thing doing? Whether Kirby was to accompany him or not, could not affect his intentions in going to the mountain, nor could his statement of that fact tend to explain his purpose in going there. His declaration of his own purpose is evidence, because it explains his intentions, and his intentions constitute part of the thing he was doing. He was traveling, and as he was going, he had certain intentions, and as these intentions could only be known by his declaration of them, such declaration is evidence. But it is impossible that Kirby's going with him could constitute any part of the thing which he was doing, which was his own journey. We think, therefore, that this part of Baker's evidence which relates to Kirby's intending to accompany Elrod, was improperly admitted by the court to go to the jury. The evidence of Jesse England was also objected to. This witness's statement is in substance such as Baker's was upon the former occasion, and we think was properly admitted. The objection

which is taken to the proceeding, because there does not appear to have been the name of a prosecutor on the indictment, it is not necessary to decide, and we therefore leave it for the action of the court below. The judgment will be reversed, and the prisoner will be remanded to White county, to be proceeded against anew.

Judgment reversed.

ATKINSON v. DANCE.

[9 YERGER, 424.]

WHERE SIXTEEN YEARS HAVE BEEN ALLOWED TO PASS since the execution of a bond due on demand, the jury may presume its payment.

COVENANT. The opinion states the case. Verdict for the defendant. Motion for new trial was overruled. Writ of error.

J. S. Yerger, for the plaintiff in error.

R. J. Meigs, contra.

By Court, REESE, J. On the fifteenth of November, 1816, the defendant and one John Spain, jointly executed the bond upon which this suit is brought, to Atkinson. The bond on its face recites that the obligors resided in Wilson county, in this state, and the obligee in the state of Virginia, and the bond is made payable on demand. The action was commenced on eighth November, 1833, nearly seventeen years after the execution of the bond. Six or eight years after the execution of the bond, Spain died insolvent. On the trial of the case, the court stated to the jury, that if sixteen years had been permitted to pass, and the debt lay dormant during that time, this would be such a circumstance as, on the naked fact of time alone, would authorize the jury to presume payment. This is the language of this court in the case of *Squibb v. Blackburne*, determined thirteen or fourteen years since: See Peck, 64. Since that time, there has been, it is believed, a general acquiescence in the courts of this state and among the profession, in the correctness of the opinion; although perhaps the point in that case was not raised and judicially determined, this court does not deem it proper to disturb that acquiescence. Time has always been regarded as auxiliary to other facts and circumstances, in questions of payment, possessing more or less importance, as the period may have been longer or shorter.

As to what amount of time alone, divested of other circumstances, shall be of weight sufficient to authorize a jury to presume payment, unless the presumption be rebutted, is necessarily arbitrary as a rule, and based on grounds of public policy. Sixteen years having, in the case referred to, been adopted, and society having acted on it for many years, it would be improper, we think, to question the correctness of the rule. There are few greater evils to be inflicted upon a community, than a fluctuation, capricious and uncalled for, in judicial opinion and decision. We felt however some difficulty in this case, in perceiving that though the claim had laid dormant for sixteen years, yet the bond was not made payable on a day certain, but on demand, in which case, it does not seem proper to presume that the demand was made forthwith, but in some reasonable time afterwards, at all events, that it would be a circumstance calculated to rebut the presumption arising from lapse of time. But the bill of exception shows, that the plaintiff himself read to the jury as evidence, an indorsement upon the bond in these words: "To amount of the within bond, due fifteenth November, 1816. To interest from fifteenth November, 1816, till," etc. This indorsement, thus introduced by the plaintiff as evidence, would authorize the jury, we think as against him, to presume that the demand was made on the day of the execution of the bond, and if so, that the claim had lain dormant for more than sixteen years. Let the judgment be affirmed.

Judgment affirmed.

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME: *Rogers v. Judd*, 26 Am. Dec. 301; *Gulick v. Loder*, 23 Id. 711; *Wanmaker v. Van Buskirk*, Id. 748 and note; *Henderson v. Lewis*, 11 Id. 737 and note; *Ludlow v. Van Camp*, Id. 529; *Livingston v. Livingston*, 8 Id. 562. The principal case is cited, as to the time necessary to raise the presumption of payment, in *Anderson v. Settle*, 5 Sneed, 203; *Yarnell v. Moore*, 3 Coldw. 176; *Carter v. Wolfe*, 1 Heisk. 700.

STATE v. HICKS.

[9 YERGER, 486.]

LANDS GRANTED TO THE TRUSTEES of Davidson academy are exempt from taxation for ninety-nine years, under the language of the act, notwithstanding into whose hands they may come.

ACTION to recover the state tax alleged to be due from the defendants, who claimed under the trustees of Davidson academy. The facts further appear from the opinion. Judgment for the defendants. Writ of error.

Geo. S. Yerger, attorney-general, for the state.

W. A. Cook, E. H. Ewing, and F. B. Fogg, contra.

By Court, TURLEY, J. In the year 1785, the state of North Carolina passed an act incorporating Davidson academy, by the seventh section of which, the two hundred and forty acres of land reserved for the use of the state, being that part of said land which is most remote from the salt springs near Nashville, was vested in the trustees for the use of the academy; and by the sixth section of which, the lands, tenements, and hereditaments vested in the trustees for the use and behoof of the academy, are exempted from taxation for the space of ninety-nine years: See act of 1785, c. 29. The trustees of this academy have, at different times, disposed of, by bargain and sale, portions of the land thus given to the academy by the state of North Carolina, a part of which is now owned by the defendants in error, on which an *ad valorem* tax is now sought to be collected by the state. The question is, has this tax been laid on the land contrary to the provisions of the sixth section of said act of incorporation? If it has been, the procedure is illegal and void, and the tax can not be collected. It is admitted by the attorney-general, that if the exemption from taxation is attached to the land, it is a privilege which will descend to a purchaser from the trustees of the academy. It seems to us that there can be no doubt, from the wording of the sixth section of the act, that it was the intention of the legislature to exempt the land from taxation absolutely for the term mentioned, no matter into whose hands soever it might come; for by the provisions of the second section of the same act, the trustees are empowered to sell any lands of the institution, unless the will of the grantee forbids it; and if the legislature had designed that the lands given by the state, or acquired from any other source, should only be exempt from taxation so long as they remained the property of the institution, and no longer, they would have so provided in express terms. We therefore think that the tax imposed can not be collected, and affirm the judgment of the court below.

Judgment affirmed.

MILES v. KAIGLER.

[10 YERGER, 10.]

THE FATHER, THE GUARDIAN BY NATURE of his infant child, has only the care of his person and is not permitted to have any control over his property, real or personal.

GUARDIAN AD LITEM AND PROCHEIN AMI are different, in that though an infant may prosecute by the latter, he must always defend by the former.

A PROCHEIN AMI CAN NOT RECEIVE THE MONEY ON A JUDGMENT in favor of his infant, enter satisfaction, and take the money out of court; much less can he compound the judgment.

IDEM.—The *prochein ami's* power ceases when the judgment debtor files his bill in chancery to enjoin further proceedings on the judgment.

WHERE, ON THE PROCHEIN AMI'S DEATH, the infants inherit from him property greater in amount than the judgment which he compounded, yet chancery will not prevent their looking to the judgment debtor, especially where the composition is of doubtful nature, and make the debtor resort to the *prochein ami's* estate.

BILL to enjoin a judgment recovered against the complainant by Isabella and William W. Kaigler, infants who sued by their father as next friend. David Kaigler, the father, gave to one John B. Miles a power of attorney to discharge or compound the judgment against the complainant, Thomas Miles. And before anything was done under this power, David wrote to their attorney not to recognize the power of attorney, and the attorney, Burton, on seeing John B. Miles shortly thereafter, told him the power had been revoked. But about a month afterwards the judgment was compounded as was alleged. David Kaigler refused to ratify this composition, but before a final hearing of the cause, he died. His administrator was substituted, who alleged in a supplemental bill that Isabella and William W. Kaigler inherited from their father more than the amount of the judgment. Decree in favor of the complainants. Appeal.

R. J. Meigs, for the complainants in error.

F. B. Fogg and G. S. Yerger, contra.

By Court, TURLEY, J. The first question for our consideration is, did the *prochein ami* have the legal power to compound this debt, which embraces two propositions: 1. If the judgment had remained at law, could he have done so? 2. If he could, can he do so after the case is removed into a court of chancery, without the consent of the chancellor? The rights of infants have at all times been guarded with jealous care by courts of justice, and an interference in any way with their estates, except by persons authorized by law, discountenanced. To such

an extent has this principle been carried, that even a father, who is a guardian by nature of his infant child, has only the care of his person, and is not permitted to have any control whatever over his property, real or personal: Co. Lit. 184; 1 Eq. Cas. Abr. 30; 3 Rep. in Ch. 165;¹ 2 Mass. 55;² 1 Johns. Ch. 3;³ 2 Wend. 153.⁴ So that if he receive a debt or legacy, he can give no acquittance therefor, and the debtor or executor will be responsible to the infant upon his arriving at full age, as if they had not paid the father. The reason and justice of this rule is obvious: the infant has not discretion to protect his own rights; his father may be totally unworthy of trust and confidence, and there is no security for his ultimate responsibility. Is there any reason why this principle of law should not be applied to a *prochein ami*, as well as guardian by nature? None that we can see; on the contrary, there are additional and striking reasons why it should. The father has every motive of affection and regard for his child, to induce him to attend honestly and faithfully to his interest; a *prochein ami* is, or may be, a stranger to him in feelings, governed by no natural sympathies in his favor, and upon whom there is no obligation for a correct performance of his trust, save his integrity, and the respect in which he may hold public opinion.

There is no adjudicated case produced in which it has been determined, that a *prochein ami* has any greater authority over the estate of the minor, whose interest he is protecting, than would a guardian by nature. A judgment, when obtained, forms a part of his estate, and if a father will not be permitted to receive it, because it would not be considered safe in his hands, upon what principle can the *prochein ami*? It is said in argument that a *prochein ami* and guardian *ad litem* are the same, and that a guardian *ad litem* may acknowledge satisfaction upon a record for a debt recovered at law for the infant; to support which are cited 1 Chit. Bl. 372, in note; and 3 Bac. Abr. 617, note b. There is some similarity between a guardian *ad litem movendum* and a *prochein ami*, but still a guardian *ad litem* and *prochein ami* are not the same, for it is well settled, that though an infant may prosecute a suit by *prochein ami*, yet he must always defend by guardian. But this question is of little importance, as we do not think that the authorities referred to, support the position that a guardian *ad litem* may receive the money recovered on a judgment in favor of his ward. The posi-

1. *Strickland v. Hadsen*, 8 Cas. in Eq. 165.

2. *May v. Calder*.

3. *Genet v. Tullmudge*.

4. *Combs v. Jackson*; 8, C., 19 Am. Dec. 508.

tion as above stated, from 1 Blackstone is, that he may acknowledge satisfaction of record, but it does not necessarily follow that he is to receive the money. We apprehend that in England, upon the payment of a judgment, a satisfaction is always entered of record, and this must be done by the person having power to make it, which, in the case of infants, must be the *prochein ami*, or guardian *ad litem*, but surely, if he were permitted to receive the money and enter the satisfaction, he would not be permitted to carry it out of court, and why? Because, as soon as the judgment is satisfied, his connection with the infant ceases entirely, his office has been performed, and for what purpose shall he take the money?

The case from Moore, 52, referred to in 3 Bac. 617, says a guardian was ordered to acknowledge satisfaction for so much as he received upon a judgment. So far as the court can see, this is the case of a general guardian, who has the care and control of his ward's estate, and the right to receive and receipt for debts and judgments. We therefore think there is no authority for saying, that in England a *prochein ami* may receive and take out of court the judgment debt of a minor, but if it were so there, we would not hesitate in refusing to be governed by a similar principle.

In England, a *prochein ami* is appointed by the court, and he must be a man of character and substance; but here, any person who chooses can act as such, no matter what his means and standing may be, provided he can give security for cost. We do not mean to say, that this has been settled by judicial determination, but by a practice so long pursued and acquiesced in, as to render it impossible to alter it, but by legislative enactment.

We have examined this question, as if the *prochein ami* had really received payment of the judgment, when nothing is further from the truth. It is true it is called a payment, and although it is nowhere stated what and how much was paid, yet we ascertain from the proof that a horse formed part thereof; then this was compounding the judgment, and we apprehend that this is the first time that it was ever seriously contended that a *prochein ami* had the power to compound the claim of the minor, whose rights he was enforcing.

But supposing all this was not so, that a *prochein ami's* power over a judgment continues till it is satisfied, and that he has the right to receive and enter satisfaction, what becomes of this power, when the person against whom the judgment at

law has been obtained, carries the matter in controversy into a court of chancery? Does the *prochein ami* go with it? We apprehend not. He has no interest in the judgment. No decree can be made against him, and he can not defend the minors, but the court appoints them a guardian *ad litem*; can it be possible then that he can do anything thereafter, by which their rights are to be affected? Surely not. In England, before the judgment could be enjoined, the money had to be paid into court. No chancellor would permit the *prochein ami*, who has prosecuted the suit at law, to withdraw the funds from court, but would direct the clerk and master, upon a determination of the matter in controversy in favor of the infant, to vest it for his interest, if he had no general guardian to whom it could be paid. In this country, upon a judgment being enjoined, instead of requiring the money to be paid into court, bond and security is taken for the performance of the decree; but this does not change the practice of the court; the money upon being collected will still, in the absence of a guardian, be loaned at interest for the benefit of the minor, under the superintending care and control of the court. It then follows, that the attempt made in this case by the *prochein ami* to compound and settle the matter in controversy, between the complainant and the infant defendants, can in no way affect their rights.

The second question for consideration is, whether, inasmuch as the defendants, Isabella Kaigler and Wm. W. Kaigler, are distributees of the *prochein ami*, David Kaigler, deceased, and, as it appears from the answer of his administrator, that a sufficient amount of his effects has been distributed to them to cover the amount of the judgment compounded with the complainant, they are not bound to submit to the act of the *prochein ami*, compounding the debt, and look for a payment thereof to his estate. This involves the power of the court to decree a satisfaction in favor of infant defendants against the administrator of David Kaigler, and the fairness of the transaction by which the judgment was compounded between the complainant, Thomas Miles, and John B. Miles, the attorney-in-fact. Whether the court has the power to give the decree asked against the administrator, we do not think it necessary to determine, as we are satisfied that the fairness of the settlement is more than questionable. Thomas Miles had shown no disposition whatever to pay the demand; he was particularly defending himself against it; he had not even shown a disposition to make any

arrangement whatever about the controversy, until John B. Miles comes forward with a power of attorney, authorizing him to compound and compromise the same; but when that takes place, we find a great anxiety on his part to put an end to the suit by settlement with the attorney. To such an extent is this carried, that he proceeds to do so, notwithstanding he is informed that David Kaigler had written a letter to the attorney-at-law, who was prosecuting the claim against him, not to pay the money, if recovered, to John B. Miles, or acknowledge his agency in the transaction, which letter was shown to him, and which he was informed was a revocation of the power of attorney. Why all this, unless he expected to make a favorable compromise? Again, why not inform us what was paid, and how much? Complainant, in his amended bill, does not state, nor does John B. Miles, in his deposition, state the amount—suspicious circumstances. So, though we do not say there is proof sufficient to authorize us to determine that the settlement was fraudulently made, yet we do say, tha' it is of so doubtful a character, that a court of chancery ought not to establish rights under it, and that the complainant, if he have any recourse against the administrator of David Kaigler, deceased, or the attorney-in-fact, John B. Miles, ought to be left to pursue it at law. This we the more readily do, because the debt was compounded, not paid; and if the complainant be entitled to remuneration therefor, it should be only for the amount he actually advanced, which is unliquidated, and can not be ascertained by a reference to the clerk and master, without taking much more proof, and which when taken very possibly might satisfy the court of the iniquity of the transaction, and besides, all the questions arising out of the compromise can be better settled by a jury than a court of chancery.

We therefore reverse the decree of the court below, and dismiss the bill without prejudice as to any right the complainant may have at law, arising out of this transaction, against either the administrator of David Kaigler, or John B. Miles.

Decree reversed.

JONES v. PERRY.

[10 YERGER, 59.]

A SPECIAL ACT AUTHORIZING GUARDIANS TO SELL LANDS OF INFANT WARDS to pay debts of the latter's ancestor, is judicial in its character and unconstitutional; and this, although the infants may have consented to the passage of the act.

THE LEGISLATURE IS NOT SOVEREIGN; it is not the constituent of the courts, nor are they its agents; and any assumption by the legislature of powers conferred on the judiciary is destitute of authority.

THE POWER TO EXERCISE GUARDIANSHIP over the estates and persons of infants does not exist in the legislature; but it is their duty to provide for and protect infants by general laws.

LAW OF THE LAND means a general and public law, operating equally upon every member of the community.

OBJECTION TO DEFENDANT'S TESTIMONY will not be sustained where the complainants have made him a witness by seeking a discovery.

ADVERSE POSSESSION UNDER UNREGISTERED DEED for seven years protects the party to the extent of the boundaries in the deed.

POSSESSION OF PART UNDER AN EQUITABLE TITLE, by which the boundary is defined, extends to the whole in the same way as if the title were a legal one.

TO ORDER THE CANCELLATION OF A VOID DEED, equity has jurisdiction.

IMPROVEMENTS ERECTED BONA FIDE may be set off against the value of the rents and profits, where the defendants entered under a deed void in fact, but which they thought to be valid.

BILL in equity. The case appears from the opinion. Decree for the complainants. Appeal.

A. Wright, for the complainants. The sale under the act of the legislature was void: 2 Cru. Dig. 45, 46, 50; 2 Bac. Abr. 685, 686; *Boyd v. Armstrong*, 1 Yerg. 40; *Gilman v. Tisdale*, Id. 285; *Neal v. McCombs*, 2 Id. 10; *Peck v. Wheaton*, Mart. & Y. 353. A guardian, as such, has no power to sell the real estate of his ward: 4 Cru. Dig., tit. Deed, 73; *Wade v. Baker*, 1 Ld. Raym. 131; *The King v. Oakley*, 10 East, 494; 3 Bac. Abr. 418; 5 Hayw. 292; 3 Yerg. 336; 7 Johns. Ch. 154; 1 Id. 561; 5 Johns. 66. The act of assembly was unconstitutional and void; it conferred no power on the guardian. It is not the law of the land: 2 Bl. Com. 44; *Vanzant v. Waddel*, 2 Yerg. 260; *Wally v. Kennedy*, Id. 554; *Bank of the State v. Cooper*, Id. 600; *Tate's Ex'rs v. Bell*, 4 Id. 202; *Officer v. Young*, 5 Id. 320. Private property can not be taken for private use, without the owner's consent, no matter how ample the compensation: *People v. Platt*, 17 Johns. 195 [8 Am. Dec. 382]; *Bradshaw v. Rodgers*, 20 Id. 103; *Harding v. Goodlett*, 3 Yerg. 41. The statute of limitations is not in the way—one of the com-

plainants was both an infant and a *feme-covert*: *Stewart v. Melish*, 2 Atk. 610; 3 Johns. 135; *Barrows v. Nave*, 2 Yerg. 227. As to John R. B. Jones, adverse possession is not shown. There is no substantial inclosure: *Brandt v. Ogden*, 1 Johns. 156; *Doe v. Campbell*, 10 Id. 475. The heirs had concurrent possession, and the law will adjudge the seisin to be in him who has the right: *Adams on Eject.* 54; 4 Hayw. 174, 177; 4 Wheat. 213; 3 Mass. 215; 10 Id. 146. The court has jurisdiction to declare the deed void: *Johnson v. Cooper*, 2 Yerg. 524; *Benzein v. Lenoir*, 1 Dev. Eq. 261, 262. The complainants are entitled to the rents and profits of the land, without any compensation for improvements: *Frear v. Hardenbergh*, 5 Johns. 271 [4 Am. Dec. 356]; *Nelson v. Allen*, 1 Yerg. 366; *Craig v. Leiper*, 2 Id. 196; *Bristoe v. Evans*, 2 Tenn. 341; *Townsend v. Ship's Heirs*, Cooke, 294; *Green v. Biddle*, 8 Wheat. 1.

Wm. E. Anderson and J. W. Combs, contra. In regard to remedies to enforce existing rights, the legislature has perfect and absolute control: *Townsend v. Townsend*, Peck, 1 [14 Am. Dec. 722]; *Hope v. Johnson*, 2 Yerg. 123; *Vanzant v. Waddel*, 2 Id. 260; *Fisher v. Dabbs*, 6 Id. 119. The law in question is clearly constitutional: *Wilkinson v. Leland*, 2 Pet. 657; *Rice v. Parkman*, 16 Mass. 326; *Williams v. Norris*, 12 Wheat. 117; *Storrs v. Peace*, 8 Conn. 541. The case is clearly within the act in regard to the limitation of actions.

By Court, GREEN, J. The first and principal question to be considered in this case is, as to the constitutionality of the act of the legislature, under which the defendants claim title. The act of 1825, c. 154, enacted upon the application of the guardians of the complainants, authorized said guardians to sell the tract of land in controversy for the purpose of raising a fund to pay the debts of complainants' ancestor. In pursuance of its provisions, they proceeded to sell the land on the eighteenth day of May, 1826, to David and Thomas Steel, to whom a conveyance was made. The Steels sold to James Perry, who took possession of the premises, and who has since sold to James W. Wheeler. The bill prays that the deed to the Steels may be delivered up to be canceled; that the possession of the land may be delivered to complainants, and that defendants' account for the rents and profits of the land since they have had possession of it.

It is contended this act of assembly is unconstitutional. 1. Because it is an exercise of judicial authority; and, 2. Because

it deprives the complainants of their property without the judgment of their peers, or the operation of the law of the land. It is clear that the legislature of this state can not rightfully exercise a judicial power. By the constitution (at the time this act was passed) it is provided in article 5, section 1, "that the judicial power of the state shall be vested in such superior and inferior courts of law and equity, as the legislature shall from time to time direct and establish." Here the whole of the judicial power of the state having been vested in the courts, the assumption of any such power by the legislature would encroach upon the jurisdiction of another co-ordinate department of the government, would transcend the powers intrusted to it, and would consequently be unconstitutional, and the act would be void. The question then recurs, is the act under consideration of a judicial character? It does not partake of the character of a law, for it forms no rule of action of that permanent, uniform, and universal character which Blackstone, in his commentaries, vol. 1, p. 1, says, constitutes the fundamental principles of municipal law. What is it then but a judicial decree? It was enacted upon the avowed ground that the estate of John Jones, deceased, was indebted. What does it do then but adjudge the existence of the debts, and decree that the lands be sold for their payment. It is, to be sure, in form a law, but we are unable to see how it differs in substance from a judicial decree, and if it is in substance a judicial decree, the form in which its makers have thought proper to clothe it, can not alter its character.

The legislature can not sit in judgment, try causes, and apply the rules of law to them, make decrees, and much less can they make decrees in the exercise of an arbitrary power, independent of and in opposition to the rules of law. It is difficult to perceive how an act which determines that the property of a party is liable for a given debt, and that it be sold for the payment of that debt, is not a judicial act; and yet in substance that is the case before us. It is true, the sale is authorized for the payment of debts generally, but that can make no difference as to its judicial character. It is the same thing in principle whether there be ten creditors or only one. We are aware that the supreme court of the United States, in the case of *Wilkinson v. Leland*, 2 Pet. 627, and the supreme court of Massachusetts in the case of *Rice v. Parkman*, 16 Mass. 326, in deciding upon acts somewhat similar, determined that those acts were no encroachment upon the judicial power. But it is to be observed as to the case of *Wilkinson v. Leland*, that the law

whose constitutionality was involved, was an act of the legislature of Rhode Island. This state has no constitution, but is governed altogether by the charter of Charles II. In the argument of the case, Mr. Wirt put the power upon the ground that there was no constitutional restriction to legislative action. "Is it necessary," said he, "to show the authority? The authority is that of the people." Judge Story, who delivered the opinion of the court, enters into no reasoning upon the subject. He says: "We do not think that the act is to be considered as a judicial act, but as an exercise of legislation. It purports to be a legislative resolution and not a decree." Now if this is the best reason which can be given why it was not a judicial act, with deference to the able judge who advances it, the opinion ought to have very little weight. If by making an act of this kind purport to be a legislative resolve, it thereby becomes a legislative and not a judicial act, all judicial power might be usurped by the legislature and exercised constitutionally in the form of legislative resolves. In the case of *Rice v. Parkman*, Chief Justice Parker puts it upon the ground that it was not a question in which different parties were interested, nor was it a decree affecting the title to the property. The only object of the legislature in that case was to grant the authority to transmute real into personal property for purposes beneficial to the owner. This view of the case, though constituting a broad distinction between that and the present case, is hardly satisfactory. For although usually there are two parties in each judicial proceeding, yet this is not always the case. An inquisition of lunacy and the appointment of a committee, is a case of this kind, yet in such case there is an exercise of judicial power and discretion. But in the case before the court, there were two parties; there were parties to the debts, which were assumed to exist, and parties to the sale which was authorized to be made.

2. We are next to consider whether this act of assembly is the "law of the land." By the eighth section of the bill of rights, it is declared "that no freeman shall be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." Lord Coke, in his commentary upon *Magna Charta*, 2 Inst. 51, in defining the meaning of the phrase "law of the land," says: "That the law might extend to all, it is said *per legem terræ*, by the law of the land." By

this court, in many cases, these terms, "law of the land," are defined to mean a general and public law, operating equally upon every member of the community.

It is, however, contended, that this provision of the constitution was not intended to apply to a case like the present, but was intended to prevent majorities in times of high political excitement from passing partial laws, whereby to create forfeitures of estates and otherwise to destroy obnoxious individuals. It is true no doubt, but that the primary object of the framers of the constitution was to protect individuals in cases like those suggested in the argument. But the language used is of general application, and forbids the enactment of a partial law by which the rights of any individual shall be abridged or taken away. Nor is there a single provision in our constitution more salutary in its character, or that demands in its enforcement the exercise of greater vigilance and energy.

The only means by which the legislature can be kept within the bounds of the constitution in times of high political excitement, is to accustom its members to the restraints it imposes, and to check their assumption of an excess of power promptly, whenever the case occurs. If, when the public mind is quiet, and public opinion sustains the courts in the dispassionate and impartial exercise of its supervisory power, precedents of constitutional violations shall not be permitted to take effect, we may hope that each department of the government, accustomed to move in its legitimate sphere, with uniformity and harmony, will not readily run into excess, even in times of excitement and party strife. Public opinion, too, accustomed to yield to the authority of judicial decisions, and to sustain the courts, even when they arrest the operation of a legislative act, will acquire a wholesome morality and a firm tone by which the courts will feel sustained and encouraged in the discharge of their duty, should the time ever come when the sanctuary of justice will be the last hope of the oppressed. Every case, therefore, where the constitutionality of a legislative act is drawn in question, is a grave and important matter, and while on the one hand the courts ought to entertain for the legislature the highest respect, and to decide against their acts only from the clearest convictions of duty; on the other hand, where they are clearly satisfied the constitution is violated, they have no alternative, but to declare that such act of assembly is not law.

The act of assembly under consideration is attempted to be

sustained upon two grounds: 1. That the complainants whose estate was sold were infants, and that the legislature in passing the act were in the exercise of a guardianship over them; and 2. That the sale was necessary to pay the debts of the ancestor.

In the case of *Rice v. Parkman*, Chief Justice Parker puts the exercise of the power to pass such laws on the ground, that the parties interested are infants, and that the government is bound to exercise a guardianship over them. In Massachusetts, the exercise of such a power by the legislature is derived from the construction the court gives to their constitution, in which it is provided (see same case, 12 Mass. 334), that the legislature shall have full power and authority from "time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, so that the same be not repugnant or contrary to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects thereof." These powers are very extensive, and some of them would seem to partake of a judicial character; but no such powers are conferred by our constitution on the legislature. It confers on the general assembly all legislative powers. No act can be passed which is not of a legislative character. But the habits of thinking in Massachusetts seem to have led to the concession that the powers of the legislature were analogous to those that are exercised by parliament. In the opinion under review, the judge says: "This is a power frequently exercised by the legislature of this state since the adoption of the constitution, and by the legislatures of the province, and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British parliament on similar subjects, time out of mind." Now it is manifest that the exercise of such a power by the British parliament is no precedent by which our legislature should be governed. Parliament is omnipotent; it can do anything not naturally impossible. Great Britain has no constitution established by the sovereign will of the people and paramount to the legislative power of parliament; so far from it, that parliament can change what they call their constitution, and hence it follows that it is above the constitution. Not so with us. The people have established the constitution as the fundamental and paramount law. The government is divided into co-ordinate departments. The legislature constitutes one of those departments, and is as much restrained and bound to

move in its prescribed sphere as either the executive or judicial. The opinion, therefore, which draws from the practice of parliament an argument in favor of the power contended for in our legislature, must be wrong.

The same opinion (page 331) advances another palpable political fallacy to sustain this power. The judge says, speaking of the relative powers of the courts and of the legislature: "The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorized another to do, and especially when that constituent is the legislature." This assumption places the legislature above the judiciary and constitutes it the sovereign. It is wholly inconsistent with the theory of our government. Sovereignty resides in the people, and having delegated to the legislature, to the judiciary, and to the executive, the exercise of that portion of it as co-ordinate departments which they have considered most fitting to be exercised by each, they retain themselves the exclusive paramount sovereignty. So far then from the legislature being the constituent of the courts, the people are the only constituents, and all the officers of the government in all the departments are their agents.

The fact that the constitution may prescribe that the mode of appointing the judges shall be by the legislature, does not constitute the legislature the constituent. If so, the electors of president and vice-president of the United States would be the only constituents of those functionaries. And as in some of the states, judges are appointed by the governor, in others by the legislature, and in others by the people directly, the constituency in each of these cases varying, the judges would be alternately at the feet of the legislature, the governor, and the people. But no such absurdity exists, and the statement of the proposition must have resulted from inattention to the form of our state and federal governments.

It follows from this view of the subject, that the legislature is not sovereign, that it is not the constituent of the courts, nor are they its agents; and that any assumption by the legislature of powers conferred by the constitution upon the judiciary, is as destitute of authority as it would be in the courts, were they, instead of adjudging what the law is, to undertake the exercise of legislative powers, and to prescribe what it shall be. These observations are made in order to show that as the sovereignty does not rest in the legislature, the power to exercise a guardianship over the estates and persons of infants, does not exist in

that body. It is the duty, certainly, of the government to protect and provide for those who are incapable of taking care of themselves; but it is the duty of the legislature to pass general laws whereby this may be done. We can not concur with Chief Justice Parker, that the legislature "might resume the burdens of this business to itself," and perform all the duties of guardian for all the infants in the country. However that might be in Massachusetts, in virtue of the very extensive powers granted to the legislature by their constitution, it can not be the case here. For the same judge (page 331) declares: "It is not legislation which must be by general acts and rules, but the use of a parental and tutorial power for purposes of kindness, without interfering with, or prejudice to the rights of any but those who apply for specific relief." Now, if such acts are not acts of legislation, and the judge here declares they are not, then, as we have seen, our legislature can not constitutionally pass them; for it has none other than legislative powers, except in those particular cases, where other powers are expressly conferred. The legislature must therefore enact general laws for the protection of infants and the management of their estates, and it can with no more propriety refuse to do so, than after such laws are passed, the courts can refuse to hear and determine the matters properly submitted to them.

It results from what has been said, that the case of *Rice v. Parkham* is not an authority in this case. If there were no other objection to considering it as such, the dissimilarity of the two cases would prevent its application. There the infants were not deprived of their property by the legislative act, but it was only transmuted from real to personal property, manifestly to their advantage. Here the property descended to these heirs, has been sold to satisfy debts for which they had not been rendered liable, and for the payment of which they had a right to require the application of the whole personal estate before their lands could be charged. In such a case as this, the court whose opinion has been so often referred to, would not have sustained the act. They say: "No one imagines that under this general authority the legislature could deprive a citizen of his estate or impair any valuable contract in which he might be interested."

The other ground upon which the competency of the legislature to pass such laws is maintained is, that the sale was necessary in order to raise a fund to pay the debts of the ancestor. It is upon this ground that the supreme court of the

United States puts the case of *Wilkinson v. Leland*, 2 Pet. 658. But in that case, the court declares that the devisee took the land, subject to the lien of creditors; that the act divested no rights "except in favor of existing liens of paramount obligation," and that it was "remedial in its nature to give effect to existing rights." This construction of the laws of Rhode Island places the case upon a principle wholly inapplicable to the case now before the court. It is settled law in this state, that the debts of the ancestor constitute no lien upon the lands descended, in the hands of the heir. The creditors of the ancestor had established no right to have satisfaction of their debts by the sale of this land. This act could not therefore be "remedial in its nature to give effect to existing rights." When to this striking discrepancy between the two cases, we take into consideration the fact that Rhode Island has no constitution containing restrictions upon the exercise of legislative power, it is manifest that this case has no application to the present one.

We will next notice the two cases from Kentucky, 4 Mon. 91,¹ and 6 Id. 592,² cited by Judge Hickey in the opinion delivered by him in the case of *Ex parte Bedford's Guardian*, 10 Am. Jur. 297: The acts in both these cases were sustained upon the ground that the lands were appropriated to the payment of debts. Their application to this particular object is the sole reason which the court (manifestly struggling to sustain them) can give wherefore they were constitutional. This reason is clearly fallacious. If it be lawful to sell by special act of assembly, the land of heirs for the payment of the debts of the ancestor, what reason can be given why, with equal propriety, the land of any citizen might not be subjected in the same way to the payment of his own debts. Let it be remembered that infamy is now out of the question. The broad proposition is that the lands of heirs may be subjected in this way to the payment of the ancestor's debts, whether these heirs be infants or adults; and why should this be when other debtors are only liable according to due course of law? Surely a man is as much bound to pay his own debts as heirs can possibly be to pay the debts of their ancestor; and if he does not pay them promptly, and the course of law by which to compel him is deemed too tedious, why may not the legislature pass a law directing his lands to be sold for their payment? Does not the absurdity of such a proposition startle us? And yet it is identical in principle with that which is maintained in the two cases referred to. Again, as is

1. *Kibby v. Chitwood*; S. C., 16 Am. Dec. 143.

2. *Shahan v. Barnett*.

well remarked by Judge Hickey, the constitutionality of the act upon this hypothesis, would depend upon the truth or falsehood of the suggestion that the ancestor owed debts. The whole reasoning upon which these cases go, is so manifestly erroneous, that they are entitled to no weight.

From this review of the cases relied on in the argument for the defendants, it results that neither the infancy of the complainants nor the fact that their land descended to them from their father, whose debts were not all paid, gave the legislature any more power to direct a disposition of their estate in a manner not authorized by the general laws of the land, than exists in that body to dispose of the estate of any other citizen in the same way. That the legislature has power upon the suggestion that a man owes debts, to pass an act directing the sale of his lands for their payment, no one would argue. And yet the exercise of such power would be less objectionable than the act in question. In this case the parties whose land was sold were not indebted. It was not certain that the debts due from their ancestor would ever become a charge on their lands. By this sale then their real estate is taken away and applied to the payment of debts they did not owe, not by the judgment of their peers, not by the law of the land; but by a special, partial act of the legislature, applicable to their case alone.

Since the case of *The Bank v. Cooper*, 2 Yerg. 599 [24 Am. Dec. 517], several cases have occurred and have been decided by this court, upon the principles of that case. In that case it was decided, that the legislature had no power to pass a law, constituting a special tribunal for the trial of a particular class of debtors to the bank, by process not known to the general law and without the right of appeal. This cause was soon followed by the case of *Wally's Heirs v. Kennedy*, 2 Id. 554 [24 Am. Dec. 511], in which it was determined, that an act authorizing the court to dismiss Indian reservation cases, where they were prosecuted for the use of another, was a partial law, and unconstitutional. Next to this was the case of *Tate v. Bell*, 4 Id. 202 [26 Am. Dec. 221], in which it was decided, that an act of assembly, authorizing the executors of William Tate to revive a judgment, which had been obtained by George Bell in his lifetime, in their names, by *sci. fa.* against Montgomery Bell, was partial in its character, was not the law of the land, and was void. In the case of *Officer v. Young*, 5 Id. 320 [26 Am. Dec. 268], it was decided, that an act authorizing James Young to prosecute a suit then pending in the circuit court of White

county, in the name of *Peter Elrod v. Robert Officer*, without taking out letters of administration upon the estate of Peter Elrod, deceased, was unconstitutional and void. These cases were all decided upon the same general principle, that the several laws upon which they arose, were partial in their operation, acting only on special cases, and tending to deprive the parties to be affected by them, of their rights and property. The same principle applies to the case under consideration, with as much force as it does to either of the cases referred to. The act under consideration is equally special, equally restricted in its operation, and tends more directly to deprive the parties to be affected by it, of their property, than either of the acts above referred to. It is not, therefore, the law of the land, and is void.

Several cases have been referred to, where special laws have been declared constitutional by this court; such as the case of *Williams v. Norris*, 12 Wheat. 117; *Ann Hope v. Johnson*, 2 Yerg. 123; and *Vanzant v. Waddle*, 2 Id. 260. These cases were all determined upon the principle, that they deprived no one of a right, but were enacted to advance the remedy of a party, whose right already existed. If they were susceptible of that construction, and we think they were, then no one would doubt their constitutionality. They would not be subject to the objection, which exists to the present case.

In the case of *Fisher's Negroes*, 6 Yerg. 119, we have an illustration of the difference between these two principles, involved in special acts of assembly. Fisher's negroes had been emancipated by his will, but in order to the enjoyment of their freedom, it was necessary, by the act of 1801, c. 27, that a petition be presented to the county court, and upon its judgment, that their emancipation would be consistent with the interest and policy of the state; a bond and security were required to reimburse the county any damages it might sustain by the emancipation. In 1829, an act was passed, allowing slaves, who were emancipated by will, in case the executor should refuse to file the petition, and give the security required by the act of 1801, to file their bill in equity, and if the court should be of opinion, that said slaves ought of right to be free, it was required so to order. Fisher's negroes filed their bill under this act, and while it was in progress, the legislature passed the act of 1831, c. 101, declaring that the act of 1829 should not be construed, so as to extend to any case existing before the passage of the act, but that in all such cases, where bills

should be pending under said act, it should be the duty of the chancellor, at the first term of his court, to have the same stricken from his docket. The chancellor refused to dismiss the bill as directed, upon the ground that the first act gave the negroes rights which the legislature had no authority by the second one to take away. It is true these acts, although probably intended for a particular case, are in form general laws. They nevertheless illustrate the principle upon which legislation may properly proceed in such cases. The chancellor's decree in this case was affirmed in this court. In the opinion of the court, as between master and slave, the will gave to the negroes a right to their freedom, and nothing was wanting to their enjoyment of that right but the consent of the government. This consent the legislature might give directly, by an act applying to the particular case, or they might by law vest the judicial tribunals with power to give it. No right was taken away by it. The negroes having been emancipated by will, Fisher's distributees had no right to them. The act communicated a benefit to them, without impairing the right of any other person.

Not so the act of 1831. That act was special. It only applied to cases where bills had been filed under the act of 1829, for the emancipation of negroes who were liberated by will before the passage of this act. These, it required, should be dismissed from the chancery court, and no adequate mode of trial existed elsewhere. The court said that the effect of the act would be, to destroy the right communicated by the act of 1829, and that doing so, it was unconstitutional.

3. It is insisted that these infants were instrumental in procuring the passage of this act of assembly, whereby the defendants were induced to advance their money for this land, and that it is a fraud in them now to take advantage of a want of power in the legislature to pass the law, and so to defeat the defendants' title. Upon an examination of the proof, it does not appear that they had any agency in obtaining the passage of the act. One witness only speaks upon the subject, and he, in answer to a leading question, indicates that the subject was spoken about in the family, without pretending that the children had any agency in getting up the petition to the legislature. But if they had done so, we are unable to perceive upon what ground they could be charged with fraud. If an infant sell his estate, making the most solemn promises to confirm the title when of age, his subsequent disaffirmance of it would

be no fraud. A sale under a legislative act, procured at his instance, would surely be no more obligatory on him than one made by himself without such act. The same want of discretion which renders him unfit to be trusted in the sale of his property, would exist to the same extent in the other case, and incapacitate him from a discreet exercise of judgment as to the proposed application to the legislature. If this argument could prevail, no infant would be safe in his possessions. It would be easy for the party wishing to purchase his estate to induce him to apply to the legislature for the passage of an act, authorizing its sale; and after the sale would be effected, he would be told, that although the act was void, yet a disaffirmance of the sale on his part would be a fraud. Thus would be accomplished indirectly that which the law prohibits from being done directly.

4. We next come to consider the question, whether the statute of limitations operates in the cause, as to either complainant, and to what extent. The possession was taken by Perry the first January, 1827; but it is contended that there is no evidence that there was a continued possession for seven years. The proof of witnesses is unsatisfactory upon this subject. But there is no necessity for resorting to witnesses, as the pleadings sufficiently show how the facts are. The bill alleges, that there was no such continued possession for the length of time necessary to form the bar, and seeks a discovery of the defendants upon this subject by interrogatories, requiring them to state how the fact is. The answer of Perry states, that he took possession of the land about first January, 1827, by his overseer and negroes, and moved to it, and took possession by himself and family in August of the same year, and remained on it till the month of May, 1831. He then moved his white family to Pulaski, and remained in Pulaski until first day of January, 1834, when he moved his family and again settled on said land, during all which time he had peaceable possession by his overseer and negroes. The complainants, by seeking a discovery of the defendant, have made him a witness upon this subject, and they can not object to his testimony, when it makes against them.

5. The possession having been proved, the next question is, how and against whom does it operate? The deed executed by the Joneses to the Steels, was dated the twenty-third of May, 1826, and registered twenty-fifth of February, 1829. This suit was commenced the twenty-fourth day of February, 1835. Seven

years did not elapse from the time the deed was registered, up to the time of the commencement of the suit. Whether, therefore, the first section of the act of limitations of 1819, c. 28, will operate to bar the complainants' claim, is a question of some doubt, and which it is not necessary to decide. We shall therefore consider the case, in reference to the second section of said act. John R. B. Jones, the oldest of the complainants, arrived at the age of twenty-one years the twentieth January, 1828. Jane R. White became of age the first day of November, 1829, but she was married to her present husband, Benton R. White, before first January, 1827; and Nancy M., the youngest of the complainants, did not become of age until eleventh September, 1832. From these facts it appears, that John R. B. Jones is the only one of the complainants against whom the statute of limitations operates; and the next inquiry is, to what extent does it operate against him?

The complainants' counsel insists, that as the defendants' possession is only protected by virtue of the second section of the act of 1819, it can operate in his favor only to the extent of his actual inclosures. In support of this position the case of *Dyche v. Gass' Lessee*, 3 Yerg. 397, is cited and relied on. That case does not support the position contended for. That was a case of naked possession, unaccompanied by title, legal or equitable, valid or invalid. It is true, Dyche, after he had been some years in possession, procured an informal deed, covering his possession; but from the date of that deed, seven years had not elapsed, before the suit was brought. The case therefore was decided, as though the deed had never existed; and there appearing nothing in the case by which to determine the extent of the possession, save the inclosures actually made, the court determined that the possession must be restricted to such inclosures. In the opinion of the court, it is true it is said: "It is most difficult to distinguish between a defendant, in by some appearance of claim, evidenced by writing of no validity in law or equity, and one holding as a trespasser, without excuse." These remarks doubtless misled his honor, the chancellor, and induced him to place this case upon the foot of a naked possession. It may be observed here, that the remarks above quoted were not called for by the facts of the case, and do not constitute a decision of the question indicated by them. But if it be true that one who is in possession, holding under an informal writing of no validity, either in law or equity, would be restricted to his actual inclosure, it does not follow that such would be the case in relation to a party holding by virtue of a

title bond, or an unregistered deed. On the contrary, we think it clear, that a party who is in possession for seven years of a tract of land, holding it adversely, under and by virtue of an unregistered deed, is protected by the second section of the act of 1819, to the extent of the boundaries of his deed. Why may not this be so? He certainly takes possession claiming to hold to that extent. Is there not the same reason why he should be considered as so holding, that exists in favor of such construction of a lessee's possession? It does not require a legal title, in order that the possession of a party shall be construed to extend beyond his actual inclosure. Possession taken under an equitable title, by which the boundary is defined, of a part, will be construed to extend to the whole in the same way that it would had the title been a legal one. We think, therefore, that as the complainant, John R. B. Jones, was twenty-one years of age more than three years before this suit was brought, he is barred of any recovery whatever in this case.

6. The next question is, as to the jurisdiction of this court. The defendants claim title to the land in controversy, by virtue of a void deed, and the complainants seek to have said deed delivered up to be canceled. It is settled in this state and elsewhere, that a court of equity has the power to order a deed, bond, or other instrument, to be delivered up to be canceled, if the same be void, whether its character as such appear from the face of the instrument or otherwise: *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Bromley v. Holland*, 7 Ves. 19; 1 Hov. Suppl. 17. See also *Johnson v. Cooper*, 2 Yerg. 524, 530 [24 Am. Dec. 502], and *Richmond v. McMinn*, 6 Id.¹ Having obtained jurisdiction of the cause for this purpose, the court will retain it, until the whole matter is disposed of and the rights of the parties settled.

7. The complainants pray that the defendants be compelled to account for the rents and profits since they have had possession of the premises. They are unquestionably entitled to an account as prayed for; but we are of opinion that in taking that account the defendants should be allowed for any valuable and permanent improvements they may have made, so that such allowances do not exceed the rents and profits for which they are chargeable.

The decree of the chancellor will be reversed and reformed according to the principles of this opinion.

Decree reversed.

1. *McMinn v. Richmonds*, 6 Yerg. 9.

"LAW OF THE LAND," defined in the note to *Bank of the State v. Cooper*, 24 Am. Dec. 538.

LEGISLATIVE ACTS UNCONSTITUTIONAL BECAUSE JUDICIAL IN CHARACTER.—An act directing a certain deposition to be read in the trial of a cause then pending: *Dupy v. Wickwire*, 6 Am. Dec. 729 and note. An act awarding a new trial in an action which has been decided in a court of law: *Merrill v. Sherburne*, 8 Id. 52 and note. A statute giving a judicial construction to a contract: *King v. Dedham Bank*, Id. 112. An act requiring a husband to pay alimony to a trustee for the maintenance of his wife from whom such act divorced him: *Crane v. Meginnis*, 19 Id. 237. An act declaring that an existing right of property shall cease, or professing to decide between an existing conflict of right: *Hoke v. Henderson*, 25 Id. 677 and note; *Officer v. Young*, 26 Id. 268.

ADVERSE POSSESSION: See *Smith v. Hoemer*, 23 Am. Dec. 354 and note; *Proprietors of Enfield v. Day*, Id. 360 and note; *Sumner v. Murphy*, 27 Id. 397 and note; *Rug v. Shoneberger*, 28 Id. 95, in the note to which, prior decisions on this subject are gathered; *Gregg v. Bigham*, Id. 181; *Partee v. Badget*, Id. 222.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

IRISH v. CLOYES.

[8 VERMONT, 30.]

ASSERTION OF OWNERSHIP OVER PROPERTY IN ONE'S POSSESSION is not evidence of conversion, where made to a stranger not within sight of the property, nor in the presence of the real owner.

DEMAND AND REFUSAL ARE EVIDENCE OF CONVERSION only where the property whereof they were predicated was in the possession of the party refusing.

DEMAND AND REFUSAL ARE NOT IN THEMSELVES a conversion, but only evidence thereof.

CONVERSION EVIDENCED BY UNQUALIFIED REFUSAL is not obviated by subsequent acts in recognition of the owner's rights; therefore, where several days after an unqualified refusal to surrender to plaintiff his property, in defendant's possession, said defendant pointed out the property to a tax-collector as that of plaintiff, and the collector thereupon made distress upon and finally sold the property, and applied the proceeds in discharge of plaintiff's tax bill, this was held not to obviate the conversion evidenced by the refusal.

APPLICATION OF CONVERTED PROPERTY in discharge of the original owner's liabilities, with respect to it, will go in mitigation of damages, in trover brought for the conversion. So if the property converted was pointed out to a tax collector as that of plaintiff, and was thereupon by the collector levied upon and sold, and the proceeds of the sale applied in discharge of plaintiff's tax bill, this may be shown in mitigation.

A RIGHT OF ACTION FOR A CONVERSION IS NOT WAIVED by plaintiff's request to a tax collector who has seized the property as that of plaintiff, to postpone his sale.

A CASE ON EXCEPTIONS MUST BE REVERSED FOR ANY ERROR appearing on the record, however trivial may be the right affected.

TROVER. The case came up on exceptions to the charge of the judge below to the jury. The nature of the charge appears from the opinion.

Briggs, for the plaintiff.

Marsh, *contra*.

By Court, REDFIELD, J. In relation to the first point decided by the court here, the question arose in reference to certain "mill logs," which were on the land, conveyed by plaintiff to defendants. There was evidence in the case, that the plaintiff had also sold this lumber to defendants. But this point being controverted, it became necessary to inquire whether any sufficient evidence of a conversion by defendants had been given. The only evidence relied upon was, that after the conveyance of the land, some stranger wishing to purchase the logs, applied to defendants for permission to purchase them of plaintiff. The defendants refused to give any such permission or consent, on the alleged ground that they had already bought the logs of plaintiff. The case finds that the defendants had not in any other way whatever interfered with the property in question. For the purposes of the consideration of this question it is to be conceded that the "logs" were the property of the plaintiff. And we have no doubt that the mere assertion by defendants, that the property belonged to them, is not in any sense evidence of a conversion, or from which a conversion can be inferred. If this assertion had been made in plaintiff's presence, and at a time when he claimed to take possession of the logs, and for the purpose of deterring him therefrom, it might merit a different consideration. But made as it was to a stranger, and not in the presence of plaintiff, or within view of the logs, it would be too much to say this is evidence from which the jury could be permitted to infer a conversion of the property by defendants.

This is in accordance with the decisions which have been had upon analogous cases. Any mere assertion of the right of dominion, is never permitted to go to the jury, in cases of trover, as evidence of a conversion, unless the assertion is made in view of the property, and in presence of the owner, and in order to deter him from exercising his just control over it. A demand and refusal are evidence of a conversion only when the defendant had, at the time of the demand, the actual custody of the property, so that he might have delivered it if he would. Hence in the case of title deeds, which had been wrongfully pledged to an attorney, but were in the custody of the attorney, it was held at *nisi prius*, and the decision has always been acquiesced in, that a demand upon the defendant and a refusal, under the

circumstances, was not evidence of a conversion: *Smith v. Young*, 1 Com. 439.¹ And a false assertion by a carrier that he had delivered the goods, does not amount to a conversion: *Attersol v. Briant*, Id. 409.² And in every case where a demand and refusal is permitted to go to the jury as evidence of a conversion, it must be preceded by evidence that the goods are in defendant's possession, or what is equivalent, in the possession of his servant, with his knowledge or by his consent, either express or implied: Bull. N. P. 44; cited 3 Stark. Ev. 1497, and also 2 Salk. 441.³

The other question raised by the counsel, is one which merits much consideration. For the question is one of a very nice character. The case shows that in regard to a harness and some old iron which belonged to plaintiff, and were merely put into the defendants' hands for safe keeping, they absolutely refused to "give them up." Here was a demand and an unqualified refusal, and it is admitted the goods were in actual custody of defendants, and they might have surrendered them if they would. A demand and refusal under such circumstances unexplained, has always been held full evidence of a conversion. A demand and refusal is not in itself ever a conversion. Such an opinion is advanced in some of the old cases, *Baldwin v. Cole*, 6 Mod. 212, but has not been held to be law for many years: 1 T. R. 478., etc.⁴ But the distinction is immaterial, for courts always charge the jury that such evidence unexplained, is satisfactory evidence of a conversion. But how may the evidence be obviated? It may be shown that the refusal was qualified at the time, as in case of goods found, by saying he did not know whether the plaintiff were the owner; or in any other manner which manifests an intention not to put the goods to defendant's use.

The refusal in this case was not so qualified. But it was shown in this case that some days after the demand and refusal, and before suit was brought, the defendant being inquired of by a tax collector for plaintiff's property, showed this, upon which the collector made distress, and after several adjournments of the time of sale at plaintiff's requests, sold and applied the avails upon the bills of taxes against plaintiff. This being wholly subsequent to the refusal, could in no sense tend to qualify it. If the plaintiff had brought his suit immediately after the refusal, his right of action to recover the value of the property would have been complete. The subsequent applica

1. 1 Camp. 439.

2. 1 Camp. 409.

3. *Jones v. Hart*.4. *Smith v. Miles*.

tion of the property even without the consent of the plaintiff would clearly go in mitigation of damages. But we are not prepared to say that it has any tendency to explain the refusal of the defendants. It is purely a second thought. And the court can not perceive, how this distress and sale, even although the plaintiff did request the sale to be adjourned, has any tendency to show that plaintiff intended to waive his claim for damages against defendants. Had plaintiff accepted the goods from defendants, there would have been some reason to contend he accepted them in satisfaction of the claim for damages, and that this should be construed a waiver of all previous claim for damages. This would perhaps have been the most rational doctrine. But the cases all show that such evidence only goes in mitigation of damages, and does not defeat the right of recovery: 3 Stark. Ev. 1506; Bull. N. P. 46; *Baron v. Davis*, 4 N. H. Cas. 338. But how it could be contended that the plaintiff's request of the officer, not to sacrifice the property or for delay for any other purpose, shall be construed a waiver of all right of recovery, although until that time a perfect right of action existed, is more than can well be comprehended.

This application of the property to plaintiff's use should go in mitigation of damages and can go no further. If this distress could go to defeat the action, then also would a tender after the refusal to surrender the property. And some cases are referred to in support of this proposition. But they are cases which have not yet been published in America, being found in 1 Moore & Scott. This proposition does not seem to be founded upon any sufficient reason. A tender, as such, is not admitted in an action of tort, however reasonable such a doctrine might seem in many cases. After a right of action in tort has once accrued, it is not in the power of the delinquent party to exonerate himself from the liability, unless by the consent of the party aggrieved, until the matter is regularly adjudicated. Why in this case an exception should obtain, it is not easy to see. True, a demand and refusal does not show a conversion in fact, but it is plenary evidence of the fact of a conversion having been committed, and unexplained, is equivalent to a conversion. It is the same then as to the effect of a subsequent tender of amends, by restoring the chattel, whether he has used, abused, or refused to surrender the property on request. In the former case the property may be more injured; in the latter case the plaintiff may have suffered great loss in being deprived of the use. It is apparent, that a redelivery of

the property will not be a full satisfaction of the damage sustained in either case supposed. In reason, it ought to go only in mitigation of damages. It is well for the defendant that by this process of compulsory application of the property to plaintiff's use, he can exonerate himself from a claim for damages to the full extent.

It was contended, that as the plaintiff's claim for damages must be merely nominal, the court will not grant a new trial where substantial justice has been done. Such is the rule in regard to new trials. And when the application is to the same court, who tried the case, or to a higher court, to set aside the verdict and for a new trial, and this addressed to the discretion of the court, as is common in New York and in the English practice, a *venire de novo* will never be awarded for any new circumstantial error or defect in the proceedings. But our trial in this court, on exceptions, is the same in all respects, except in form, as if it were on "writ of error." And we have only to pronounce whether there be error in the court below; if so, we have no discretion, and a new trial follows of course.

Judgment of county court reversed, and new trial granted.

REFUSAL TO DELIVER PROPERTY IS NOT PER SE A CONVERSION, but an absolute refusal to deliver property creates an inference of law that there has been a conversion: *Dent v. Chiles*, 26 Am. Dec. 350 and note 356.

DEMAND AND REFUSAL are not evidence of conversion unless the defendant had at the time possession and control of the goods of which they were made: *Baker v. Wheeler*, 24 Am. Dec. 66.

STATE v. KEYES.

[8 VERMONT, 57.]

ARTICLE VII OF THE AMENDMENTS TO THE NATIONAL CONSTITUTION establishes a limitation to the mode of trial in the federal courts, but not in the state courts.

WHETHER THE CHARACTER OF AN OFFENSE IS INFAMOUS can not be determined by the mode of punishment affixed to it by law.

ATTEMPT TO DETER A WITNESS from attending the trial of a public prosecution, is an indictable but not an infamous offense; it is an offense also that may be punished by proceedings on information.

SUCH ATTEMPT, THOUGH MADE BEFORE SERVICE OF A SUBPENA, and though it prove unsuccessful, is nevertheless punishable.

RECOGNIZANCE TO APPEAR AS WITNESS at a certain term of court imposes upon the conusee the obligation to appear, if the case is not heard at that term, at each succeeding term until the case is determined.

INFORMATIONS against defendant, for his attempts to deter two witnesses from appearing on the trial of Joshua H. Howe, held for felony. There were two counts to each of the informations, the nature of which appears from the opinion. There was a motion made in behalf of defendant to quash the informations; the motion being overruled, and the defendant being found guilty on the trial, a motion in arrest of judgment was made. This was also overruled.

Henry Adams, for the state.

Smith and Beardsley, *contra*.

By Court, REDFIELD, J. The first question, in this case, arises upon the decision of the county court in overruling the motion to quash. That motion was made upon the ground, as we infer from the argument here, that this respondent being charged with an infamous crime, was entitled to insist upon a trial upon indictment. In support of this position the counsel rely mainly upon the seventh of the articles proposed and adopted in amendment of the constitution of the United States, which is in these words: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger." As these amendments were professedly proposed and adopted with the expectation that they would define, limit, and explain the provisions of the constitution, as originally reported by the convention, it is but reasonable that the amendments should be construed with a reference to the constitution. There can be no doubt this seventh article of amendment was adopted with reference to the third article and second section of the constitution. This section provides for a national judiciary, but nowhere requires that one accused of crime shall be entitled to require a bill of indictment to be found by a grand jury, before submitting to trial for the alleged offense. The only limitation, as to the mode of trial, found in the constitution, is, that the accused shall be entitled to trial by jury (traverse jury of course), and that the trial shall be had within the state where the offense was committed, if committed within the limits of any state, and if not, then at such place as congress may by law have directed.

This seventh article of amendment provides, that in all capital or otherwise infamous crimes, the accused shall be

entitled to the further safeguard of liberty or life or character, afforded by a grand jury. The eighth article of these amendments states further limits, and restricts the mode of trial for crimes, by providing that the trial shall always be by a jury of the district where the offense is committed, which district shall have been previously defined by law. It could not well be doubted, that the provisions in the constitution, as first reported, and the amendments, all have reference solely to trials in the courts of the United States. The phraseology clearly indicates this. In the first provision, trial by impeachment is excepted from the cases required to be tried by jury. This most clearly points to those trials which the constitution provides shall be had before the senate, on the motion and information of the house of representatives. In the article of amendment alluded to, and which is relied upon in this case, offenses committed in the land and naval service are excepted. The phraseology adopted in both cases, clearly indicates, that the provision has reference only to proceedings in the tribunals of the United States. The same reasoning and conclusion has been adopted by this court in reference to that article of amendment of the United States constitution which provides for trial by jury in civil actions: *Huntington v. Spooner's Trustee*, 5 Vt. 189. And we see no good reason why the same decision should not be now adhered to. The language of the twelfth article of amendment thoroughly fortifies this construction. It provides that powers not delegated to the United States shall belong to and be exercised by the states. And although it be true that some of the provisions of the constitution of the United States are intended to be applied as well to the states as to the United States, such is not the fact in regard to its principal provisions. And we can not presume that, but the contrary, to be the case, when the language of the instrument is general or equivocal. It might be added as a further reason why we should not be inclined to adopt the view presented by respondent's counsel, and consider this article of the United States constitution as extending to trials in the state courts, that the contemporaneous construction and subsequent practice has, in reference to this subject, been wholly at variance with any such determination. Petty larceny, which is now very generally admitted to be an infamous offense, is in all our cities tried before the police courts, where it is well known no grand jury attend. The same is true of trials for petit larceny in this state and many of

the other states, before single magistrates. And it has never been doubted that these convictions, upon information, were regular and valid. This consideration alone is entitled to great weight, as has been repeatedly held, both by the state and United States courts.

But even if we could adopt this view of the case, we are not prepared to say that the offense attempted to be charged in this information, is in its character infamous. The old notion that infamy depended upon the nature of the punishment, is long since abandoned. But we get nothing in its stead, which is, on the whole, much more satisfactory. We find the books filled with general definitions in abstract terms, which no man can pretend clearly to comprehend. Treason and felony, as at common law, are terms sufficiently intelligible, but the term *crimen falsi* is one of most indefinite extension, and when Russell extends it to every falsehood which affects the public administration of justice, it is certainly leaving so important a consequence to depend upon a very loose and unsatisfactory condition. Legal infamy, as a part of the punishment of crime, is by far the severest portion of the punishment, in most cases of conviction of an infamous offense. It is important then, that the number of infamous crimes, which on conviction shall induce legal infamy, should not be multiplied by construction. Those which are held to be infamous, as treason, felony, forgery, and perjury and bribery, should be clearly defined and well known. Some of the English decisions of late seem to have gone great lengths. The case of *Bushell v. Barrell*, 21 Com. L. 483,¹ expressly decides, that inducing one to absent himself from attending as a witness, in a question depending before justices in relation to offenses against the revenue laws, was an infamous offense. This is put upon the ground of its being an offense tending to hinder the due course of public justice. An attempt even to induce a witness by threats or promises or any other means to disregard his obligation to attend as a witness upon the trial of a public prosecution, when the security of the public quiet and the purity of the fountains of public justice may be hazarded, is undoubtedly a high-handed offense, and as such should be severely punished. But when it is recollected, that in the heat of zeal to save a friend, whom they may believe to be more innocent than the testimony would seem to admit, men will sometimes be induced to go great lengths, and sometimes without much consideration, it is not perhaps best, that every

1. 21 Com. L. 790; S. C., Ry. & M. 434.

attempt to induce a witness, under such circumstances, to avoid being compelled to attend even a public trial for felony, should be declared infamous. The decisions here have never as yet gone so far, and we should certainly hesitate in following the recent English authorities.

Upon both grounds then, we think the motion to quash should have been overruled. But the respondent further moved the court in arrest of judgment for the insufficiency of the information. It is said, there having been no subpoena served upon the person, he can not be considered in the light of a witness. But it will be difficult to say, just when the person will become so far a witness that it will be an offense to hinder him from giving his attendance upon the court. The essence of the offense is obstructing the due course of justice. This has always been held indictable, as a misdemeanor at common law. Whether the witness had been served with a subpoena or not, can not be esteemed very material. The effect of the act and intent of the offender is the same, whether the witness has been or is about to be served with a subpoena, or is about to attend in obedience to a voluntary promise. Any attempt, in either case, to hinder his attendance, is equally criminal, and equally merits punishment. But in the case of the second count, this question does not properly arise. It is there alleged that the witness had been recognized for his appearance at a former term as a witness in this case. It has been decided by the court, that such a recognizance, though not so expressed, imposes upon the conusee, whether respondent or witness, the obligation to attend from term to term, until the case is determined.

It is said at bar, that the bonds of Howe had been estreated, and thus Keezer exonerated from the obligation of his recognizance. This question can not arise on a motion in arrest, or if it could, the indictment being good, the motion in arrest can not prevail. For in criminal proceedings on motion in arrest, if one count in the bill or information be good, it is sufficient, although the contrary rule prevails in civil suits. And in any view of the case, the offense was complete. The witness having once been improved before the justice and recognized for his appearance to testify on the final trial, can not be presumed to be in doubt, whether his testimony would be required on the final trial. Knowing this, it would be equally criminal in him corruptly to absent himself from the state or keep secreted, or in any other way avoid being summoned as a witness, whether his recognizance was, or was not, still in force. The question

here is not whether the witness has been guilty of a contempt in disobeying the process of the court, but whether there has been a corrupt attempt to obstruct the due course of public justice by "spiriting" away or preventing the attendance of a witness. If the person induced to absent himself, knew of his being a witness, and was induced to absent himself, the offense was complete in him. If the respondent knew of his being a witness and about to be compelled, in due course of law, to attend the trial, and endeavored to dissuade and hinder him therefrom, in the language of the indictment, his offense is complete. In this case, knowledge is carried home to both. It will not do, for a moment, to admit that the respondent might anticipate the officers of justice, and secrete, bribe, or intimidate the state witnesses from attending the trial of public prosecutions, and not be liable for any act done, until a subpoena had been legally served upon the witness.

This view will leave untouched the most corrupting field for offenses of this character. It is further argued that the information is insufficient, because it contains no allegation that the offense was consummated, but only an attempt to hinder the witness from attending the trial. This question was formerly much discussed in Westminster hall, but is now well settled. The case above cited from Com. L. (*Bushell v. Barrett*), shows that a conspiracy to bribe a witness, to induce him not to give his attendance upon court, is held not only a high misdemeanor, but an infamous offense. And the doing of any act tending to obstruct the due course of public justice, has always been held indictable as a misdemeanor at common law. Bribing, intimidating, or persuading a witness not to testify, or not to attend court, are each among the readiest and the most corrupting of this class of misdemeanors. The mere intent to commit a misdemeanor, or even a felony, until evidenced by some act, is not indictable, for a very sufficient reason, that human tribunals can not take any just cognizance of human thoughts or intentions, except so far as they are expressed in their actions; and except in times of flagrant misrule and tyranny, this has never been attempted. But it is well settled at common law, that an attempt or endeavor to commit a felony or misdemeanor, is punishable itself, as a substantive misdemeanor. An attempt to bribe the first lord of the treasury, to procure the reversion of the office of clerk of the supreme court of Jamaica, was in Lord Mansfield's time held clearly indicta-

ble: *Box v. Vaughn*,¹ 4 Burr. 2494. See also *Plympton's case*, 2 Raym. 1377, and 1 Russ. on Crimes, 45, 46.

It is equally well settled, that an endeavor to induce another to commit a felony or misdemeanor, is indictable as a common law offense: *Rex v. Philipps*, 6 East, 464. The soliciting another to embezzle his master's money, was held clearly indictable: *Rex v. Higgins*, 2 Id. 5. See also the cases there cited. In reason, a criminal intent, and an act in furtherance of the intent, whether success follow or not, is deserving of the same degree of punishment, almost as if the principal offense had been consummated. Assaults with intent to murder or to commit rape, are by statute punished with great severity, as substantive offenses. And we feel no hesitation in saying, that the attempt to commit an offense or the soliciting another to commit an offense, should (with few exceptions not necessary to be enumerated here, resting upon peculiar grounds) be held indictable, as misdemeanors at common law. This disposes of all the objections urged against the indictment.

The respondent not being in court to receive sentence, the bounds, on motion of the state's attorney, estreated.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES adopted at the first session of congress are restrictions upon the powers of the general government only, and not upon those of the states, *per* Walworth, Chancellor: *Livingston v. Mayor of New York*, 22 Am. Dec. 622. So article 4 of the amendments has been held to have no application to proceedings under state authority: *Reed v. Rice*, 19 Id. 122, and so of article 5: *Barker v. People*, 15 Id. 322.

REYNOLDS v. FRENCH ET AL.

[8 VERMONT, 85.]

RECOVERY MAY BE HAD UPON A LOST PROMISSORY NOTE or upon one voluntarily surrendered to its maker.

ACCEPTANCE OF PART OF THE AMOUNT OF A PROMISSORY note in satisfaction thereof, and its surrender to the maker, will not discharge the latter, if the transaction has been induced by his fraudulent misrepresentations.

ASSUMPSIT upon three promissory notes. The declaration contained, besides the special, general counts. *Non assumpsit* was pleaded. Plaintiffs on the trial offered to prove the following case, evidence as to which was rejected by the court: That in March 1834, defendants represented to plaintiffs that French, one of their number, had disposed of his property in payment

1. *Rex v. Vaughn*.

of his debts, and had left in his hands after so doing only the sum of four hundred and fifty-one dollars and sixteen cents, an amount less than that of the notes now sued upon, and had thereupon offered such amount to plaintiffs in satisfaction of the notes; that plaintiff, believing these representations, had accepted the proposition, the defendants other than French being insolvent, and had surrendered the notes; that the representations were false, and that soon after the transaction, French obtained a reconveyance of property, which he had conveyed in order to effectuate it.

H. R. Beardsley, for the plaintiff.

Smalley and Adams, contra.

By Court, PHELPS, J. The production of a promissory note is not always indispensable to a recovery upon it. Such production is dispensed with, where the note is proved to have been destroyed, and, in this state, where it is shown to have been lost. The reason why a recovery can not be had upon a lost note which is negotiable in England is, that the note may find its way into the hand of a *bona fide* holder who may be entitled to payment. But here no such reason exists, as by force of our statute, restraining the negotiability of such notes, the transfer of a note is put upon the footing of an assignment of a chose in action. And it is also true, that a recovery may be had upon a note after it has been voluntarily given up to the maker. This doctrine was fully recognized in *Edgell v. Stanford*, 6 Vt. 551. And it seems immaterial in such case, whether the plaintiff count specially on the note, or generally in *indebitatus assumpsit*. If there be any case of the kind where a recovery may be had, it would seem to be that in which the note is obtained from the holder by fraud and imposition. The plaintiff may doubtless treat the transaction, which resulted in giving up the note, as fraudulent and void, so far at least as to the agreement to accept the smaller or new note in full satisfaction. That a court of chancery would set aside a discharge given under such circumstances, and revive a security procured to be given up or canceled by fraudulent representations, is settled by the case of *Richards et al. v. Hunt*, Id. 251 [27 Am. Dec. 545]. If that decision requires authority to support it, it is to be found in *Phetliplace v. Sales*, 4 Mason, 812, and *Irving et al. v. Humphry*, 1 Hopk. 284.

Can a court of law afford relief in a similar case? The case is, in principle, the same as if a discharge under seal had been

given without a surrender of the notes. In that case a court of law would, upon common principles, treat the discharge as void, if obtained by fraud. The only difference in this case is, that the plaintiff is unable to produce the notes on trial; and, in this respect, the cause comes within the rule of *Edgell v. Stanford*. The action of assumpsit proceeds upon equitable grounds, and in a case of this nature, where a full and adequate remedy may be had at law upon common principles, there is no good reason for driving the party to the more expensive and less expeditious remedy in chancery. In *Richards et al. v. Hunt*, no relief could be had at law, as the party was discharged for imprisonment on the execution. No suit could be sustained upon the jail bond, as there was no escape, and as to the judgment, there was an apparent satisfaction of record. In this case no technical difficulty is encountered. We are therefore of opinion, that the evidence offered in the court below should have been admitted. We do not deem it necessary to decide upon which count the plaintiff may be entitled to recover, though, if the amount of the notes be still due, it is difficult to discover any good reason why the party may not recover upon either.

It is suggested that some of the defendants may have been sureties, and upon this assumption it is argued that if the notes have been voluntarily given up, the sureties are discharged. It is unnecessary to discuss that question, as it does not appear on record that any of these defendants are sureties. The evidence having been rejected, the fact was not ascertained. Should it so appear upon a future occasion, it will then be in due season to determine its effect. It is also urged that the reception of parol proof is dangerous, as there may have been indorsements on the notes, of the purport of which no proof can be had. This argument however applies with equal force to all cases of actions upon notes lost or destroyed. But in this case, the notes were given up to the defendants, and of course the evidence of such indorsements is still in their own power, unless they have of their own motion destroyed them.

The remarks of the chief justice in *Edgell v. Stanford* are relied upon as sustaining the position, that if a note be voluntarily given up to be canceled it can not afterwards be made the ground of recovery. The remarks alluded to were made with reference to the mere substitution of one security for another, and to the question, with respect to which different decisions have been had, whether the acceptance of a new security of no higher nature is a satisfaction, or whether the

party may resort to his original cause of action. He had no reference to a case like this. Indeed the whole drift of his opinion was to establish the right of recovery in such a case.

Judgment reversed and cause remanded to county court for a new trial.

ACTIONS UPON LOST INSTRUMENTS: See *Kerney's Adm'r v. Kerney's Heirs*, 29 Am. Dec. 213 and note.

SAWYER v. ADAMS.

[8 VERMONT, 172.]

THE RECORD OF A DEED WILL NOT IMPORT NOTICE to subsequent purchasers or creditors, where it has been made by the officer intrusted with the duty of recording deeds, on the back leaf of a book which had been filled by the records of prior deeds, for twelve years past, and had since that time ceased to be used for recording purposes, and where moreover the names of the parties to the deed were not entered in the index to the records.

RECORD OF A DEED IMPORTS NO NOTICE, if in it appear defects, which, had they been contained in the original, would have made it void.

RECORD OF A DEED from which it appears that less was conveyed than was really conveyed, imports notice of a conveyance only to that extent.

EJECTMENT. The opinion states the case.

Smith, for the plaintiffs.

Ormsbee and Royce, contra.

By Court, WILLIAMS, C. J. The plaintiffs, being creditors of Cyrus Adams, attached the premises in question, recovered judgment, and levied their execution thereon. The defendant, James Adams, being in possession of the premises, they commenced their action against James and Cyrus Adams. James set up a title under a mortgage deed from Cyrus of a prior date, duly executed and acknowledged, and on which there is a certificate of Cyrus, who was then town clerk, that it was received for record and recorded. On referring to the records it is found that the mortgage deed was recorded on the back leaf of volume third of said records, on which there had been no deeds recorded for upwards of twelve years previous to the time said mortgage purported to be recorded. On the back leaf of the fourth volume of records, another deed from Cyrus Adams to James Adams, dated June 3, 1826, was copied as recorded, although the last deeds recorded on that book, were in May, 1820. In the fifth volume of the town records there was no

record of the deed in question, although it was the book where others, received in June and July, 1826, were recorded. It further appears, there was no paging on the book beyond page 424, nor in the place where the mortgage was copied or recorded. In the alphabet it is found that the names of the parties to this deed are not entered, either as referring to the place where the deed was recorded, or attempted to be recorded, or to any other book or place. It is admitted in the case, that the mortgage deed was secretly and fraudulently recorded by the said Cyrus Adams, who was then town clerk of the town of Middletown, on the back leaf of an old book of records; and it must also be considered as established by the verdict, that James had not consented nor was privy to this fraudulent act of Cyrus Adams, the grantor and town clerk. The whole question is, was this deed of mortgage duly recorded? For, if it was, the plaintiff and all others are bound to recognize it, and are considered in law as having notice of its contents. If it is not duly recorded, and the plaintiffs had no actual notice of its execution and contents; on the principle that a conveyance of a later date duly registered is to have priority to a deed of an earlier date not recorded, the title of the plaintiffs must prevail. In the first place it may be remarked, that an act false and fraudulent is usually considered as no act, but as a mere nullity. The expression, therefore, that the deed was fraudulently recorded, was probably intended as referring only to the intentions and designs of Cyrus Adams; not as expressing that the placing the deed in the book where it was found, was, in itself, a fraudulent act. Without, however, attending particularly to this, it will be proper to inquire what is meant by recording a deed, and what is the object of such a record; and upon the answer to these inquiries it will be determined whether this mortgage has been duly recorded.

On the first particular, there is but little doubt that recording means the copying of the instrument to be recorded, into the public records of the town, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor. This recording may and does take effect from the time the deed or instrument is delivered to the officer, if it is in due time placed upon the records. The delivery of the deed to a town clerk, or his minute on the same, that he has received the same for record, are not the recording; but the record, if completed, is considered as taking effect from that time. Hence, if the deed is

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by the grantee taken from the possession and custody of the clerk after he has received it, and again returned, the record can only be considered as taking effect from the time it was returned. This was decided in the case of *Brush v. Cook*, in Franklin county, January, 1824.

Furthermore, the deed must be duly recorded. Hence, if the deed, as it appears on the record, contains defects which would render it void, if they existed in the original, although there are no such defects in the original, such deed is treated as not recorded. The cases which have been decided on this principle, *Huntington v. Cobleigh*, 5 Vt. 49; *Skinner et al. v. McDaniel et al.*, 4 Id. 418, are but following the principle decided in Popham's reports, "that an enrollment remains good, notwithstanding omissions by the clerk, when the omissions are not that which is of any substance in the deed." *Sir Francis Englefield's case*, Poph. 21. If the town clerk in recording a deed, through accident or design, carelessly or falsely records or describes the boundaries in a deed, so that it would appear to convey but a part of the land conveyed in the original deed, the record would be good only, and considered as notice only of a conveyance of so much as appeared on the record to be conveyed. In the case of *Beekman v. Frost*, 18 Johns. 544 [9 Am. Dec. 246], the registry of a mortgage of three thousand [dollars] as a mortgage of three hundred was considered as notice only of an incumbrance for the sum stated in the record. In such cases, the purchaser may be wholly free from fault or negligence. He may deliver his deed to the proper officer, and it may be returned to him as recorded, but through accident or design it is not truly recorded. Subsequent purchasers or creditors, having no other means of knowledge of the contents of the deed than by resorting to the records, can not be considered as having notice of any other conveyance than such as appeared on record.

The object of recording, as has already been noticed, is for the purpose of notice to after purchasers and creditors. In considering what is necessary to complete a record, it will not answer to say that the record may be so made as entirely to defeat the object for which it was designed. The purchaser may fairly deliver his deed to the town clerk. The clerk may return it to him with a regular certificate that it has been recorded; and if he does nothing more, if he does not record it in fact, there is no actual or constructive notice to purchasers of the existence of such deed. The clerk is guilty

of fraud, and the person who left the deed for record is deceived; still his deed is not recorded, and no title passes thereby, except as against the grantor and his heirs. In such a case there can be no doubt that the purchaser will lose his title through the fault or fraud of the town clerk. In applying these principles to the case under consideration, we can not hesitate in saying that the mortgage deed of the defendant has not been recorded, and that the act of the town clerk was as wholly inoperative, as if he had written this deed on a slate, or copied it into his family record. The duty of the clerk was plain, to record this deed in the book where he was then recording other deeds; and it seems that he had then recorded as far as the fifth volume or more. Book 3, in which this deed was recorded, was not the book for recording deeds at that time, and had ceased to be so for more than twelve years. It was a book of records, full and completed, and not a book in which deeds were thereafter to be placed. Such a record as was attempted by the town clerk was not, and it was designed that it should not be any notice to the creditors of Cyrus Adams, and was as palpable a fraud and as gross a deception as was ever attempted by any man in a public office. The deed was not recorded in a book kept for that purpose, and undoubtedly was kept from the alphabet for the very purpose of deception and concealment. We can not consider that this deed was recorded according to the letter or spirit of our constitution and laws upon that subject; and unless we admit that a deed may be recorded in any place, where the town clerk may choose for the purpose of concealment and not for notice, and which he may call the records of a town, we must treat this record as a mere nullity.

A variety of new cases have been supposed in argument, in which a town clerk might literally perform the duty, and yet render his act wholly ineffectual. We can not say, how ingenious, or corrupt and fraudulent public officers may be in evading the laws; nor are we to suppose that cases may exist more flagrant than the one under consideration. In one of the cases supposed, of the clerk recording a deed and immediately gluing two leaves together, or cutting out the one containing the record, it may not perhaps be material to inquire what would be the effect of such an act. The same thing might be done by any other person. Either of them in such a case would be guilty of forgery and exposed to the penalty of the law therefor. If the deed was actually recorded and the duty enjoined by law done and performed, it is not necessary to declare what

would be the effect of such after proceedings; but I can say for myself that, if I believed the town clerk recorded the deed, having at the time the intention to cut it out or efface it as soon as recorded, and did so cut it out or efface it, I should be loath to say that such a deed had ever been recorded. In the case supposed, of his keeping weekly books in which he recorded such deeds as he chose, if it was done for no justifiable reason or excuse, but for the purpose of concealment and fraud, it would not and ought not for a moment to be considered as a compliance with the statute. The result to which we come is, that the mortgage deed has not been recorded; and we do this with less reluctance, as the defendant has a clear and undoubted remedy against the town clerk and against the town, if he has not been in any way a party, or consenting to the fraudulent act of the town clerk. The remedy of the plaintiffs, in the event of a decision the other way, is not so clear. Indeed, if the mortgage of the defendant had been recorded, they had constructive notice, and proceeded with knowledge of the existence of the deed, and probably could have no remedy.

The judgment of the county court is reversed, and new trial granted.

IRREGULARITIES IN RECORDING DEEDS, EFFECT OF.—From the opinion of the court in the principal case, Judge Phelps dissented. The dissenting opinion admitted that the failure of the town clerk to properly record the deed in question, constituted a case of gross official misconduct, rendering him liable to the party who should suffer damage therefrom; but insisted that the recordation was of a nature to satisfy the requirements of the statute, and that the liability of the officer arose from his fraudulent concealment of the record, and that as the record was in compliance with the statute, and therefore of a nature to protect the grantee, this liability was to the subsequent attaching creditors. The following from Judge Phelps' opinion will indicate the line of his argument: "Our whole system on this subject is briefly this: The law, as a matter of convenience and expediency, requires all conveyances of real estate to be recorded in certain offices, thus furnishing a place to which all persons may resort to ascertain the state of the title. And the object of this is to give notice, not to the parties to the conveyance, but to strangers. But in order to carry this policy into effect, it becomes necessary to compel the grantee to get his deed recorded, and this is done by rendering the deed inoperative against strangers unless it be recorded. An officer is appointed in each town for this purpose, whose duty it is to record all conveyances, and to secure the party whose deed is required to be recorded; the town clerk is made liable to him, if he neglect to record any deed and the party is injured. When the deed is recorded the title is perfected, the town clerk has discharged his duty to the party to the conveyance, who has no further interest in the official duties of the town clerk. But the object of the law is not yet attained. That object is to give notoriety and publicity to the conveyance, and to enable others to ascertain the state of the title; and for

this purpose the town clerk is required not only to give copies, but to subject his record to the inspection of every person, and all persons, who shall have occasion to examine it. He is subjected in case of refusal not only to a penalty, but to all damages to the party aggrieved. Now who is the party aggrieved in this case? Most clearly not the party whose deed is recorded, but the person who desires a copy, or wishes to examine the title. In this view of the subject it is obvious that the clerk has separate and distinct duties to perform. A duty on the one hand to the person whose deed he is required to record, and a duty on the other hand to the person who finds it necessary to inspect the record. These are separate and distinct. One may be fully discharged and the other not; and if the first be discharged and the rights of the party once established, those rights can not be affected by a failure in the other by which a third person may be injured or defrauded." Judge Phelps was of opinion, however, that the record, if deficient in itself, as in the case of *Beekman v. Frost*, 18 Johns. 544; S. C., 9 Am. Dec. 246, where a mortgage of three thousand dollars was recorded as one of three hundred dollars, would not import notice of more than appeared on its face.

The subject is examined in the note to *Beekman v. Frost*, *supra*. In arriving at a determination as to what shall be a fulfillment of the requirements of the registration laws, an important factor to be considered is the obvious intent of such laws, to provide the public with certain means of information as to the state of title. This purpose evidently demands that the constructive notice imparted by a record be strictly confined to that which is set forth on its face. Of the courts of this country, some have rigidly upheld this rule, while others have bent it to the exigencies of particular cases. To the first class belong the courts of the states of New York, California, Tennessee, Iowa, Minnesota, Ohio, Vermont, Missouri, Georgia, Wisconsin. In these states it is held, that the constructive notice imparted by a record is only of those facts which appear upon its face. Thus, in Vermont, where the deed of the west half of certain property was recorded as a deed of the east half, subsequent purchasers were not affected: *Sanger v. Craigue*, 10 Vt. 555. In *Parret v. Shawbush*, 5 Minn. 323, a deed requiring two attesting witnesses, was by mistake recorded as having been witnessed by only one, and it was held no notice to a subsequent incumbrancer of the property. To the same effect are: *Miller v. Bradford*, 12 Iowa, 14; *Whalley v. Small*, 25 Id. 184; *Jennings v. Wood*, 20 Ohio, 261; *Lally v. Holland*, 1 Swans. 395; *Baldwin v. Marshall*, 2 Humph. 116; *Chamberlain v. Bell*, 7 Cal. 294; *Beekman v. Frost*, 18 Johns. 544; *Shepherd v. Buchalter*, 13 Ga. 443; *Terrell v. Andrew Co.*, 44 Mo. 309; *Pringle v. Dunn*, 37 Wis. 464.

In other of the states, as in Alabama, Illinois, Rhode Island, and Virginia, the more lax doctrine appears to prevail, that a grantee, doing all in his power to have his deed recorded, protects himself, whether it is ever in fact recorded or not. Thus, where a deed was left for record by a grantee, and was afterwards transcribed to the record book, but with misdescriptions, this was yet held a compliance with the statute requiring registration; *Merrick v. Wallace*, 19 Ill. 486; see also, *Kiser v. Houston*, 35 Id. 252; *Nichols v. Reynolds*, 1 R. I. 30; *Beverley v. Ellis*, 1 Rand. 102; *Mims v. Mims*, 35 Ala. 23.

The Illinois statute, it is true, under which this rule was established, provided that "all deeds and other title papers, which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before as to all subsequent purchasers without notice," etc. And the Alabama statute made the deed operative as a record from the time that it was filed. And the courts of these states, in holding that a

deed left for record would protect the grantee, laid stress upon this phraseology of the statute. But these provisions in recording statutes are quite common, if not universal. They exist in the Iowa, Missouri, and California statutes, where the different construction prevails, that this provision merely causes the time of recording of a deed to relate back to the time of its deposit, but that it will by no means cure any defects in the recording. See decisions cited, *ante*.

Of course in the states holding a grantee protected, if his deed be once left for record, Judge Phelps' opinion would receive more favor than that of the majority of the court. How it would be in the other states is not so clear. Judge Phelps took a distinction between the duties of the recording officer to the public and his duties to the individual desiring his deed recorded. This distinction is recognized to some extent in the subsequent case of *Curtis v. Lyman*, 24 Vt. 338. There a town clerk had properly entered a deed upon the records, but had failed to index it. The statute in that state provides that deeds "recorded at length in the clerk's office of the town in which such lands, tenements, or hereditaments lie, shall be valid to pass the same without any other act or ceremony in law whatever." It also provides for the indexing of recorded deeds. It was held that the grantee of the recorded deed was protected, and that had any of the general public suffered damage from the failure to index, then there was a liability to such person on the part of the town and clerk. To the same effect are *Chatham v. Bradford*, 50 Ga. 692; *Schell v. Stein*, 76 Pa. St. 400. This then reduces the grounds upon which the conclusion in the principal case is reached to the one fact of the recordation of the instrument in a book long since ceased to be used for recording purposes. A parallel case is that of *New York Life Ins. Co. v. White*, 17 N. Y. 469. There an entry was made of a mortgage in a record book, out of the order due to its date and upon a page which should have contained a mortgage several years antecedent in execution; and it was held not to impart constructive notice. In that case the principal case was relied upon. These two cases seem to be the only two adjudications upon the subject. Their concurrence, and the further fact that they are in accord with the general policy of the courts by which they were delivered of fostering public confidence in the records, seem to establish them as the more correct exposition of the law.

BROMLEY v. HUTCHINS.

[8 VERMONT, 194.]

THE SHERIFF OF A NEIGHBORING STATE has not the right to pursue and recapture in this state a prisoner held on civil process, who has in such neighboring state escaped from his custody.

ASSAULT and battery. The defendant, justifying as servant of the sheriff of Washington county, New York, set up in his plea that the plaintiff, after his arrest by said sheriff in Washington county, on a *capias ad respondendum*, had escaped to Danby in this state, and that he had been immediately pursued and there retaken by said sheriff, and by the defendant, acting as his ser-

vant. On demurrer, the county court gave judgment for the plaintiff.

Dexter, for the plaintiff.

Harman, *contra*.

By Court, COLLAMER, J. Were this a question of mere recapture on fresh suit, it would be of simple solution. As the duty of protection on the part of the government is the correlative of allegiance on the part of the citizen, it becomes a grave question, whether this duty can be performed by the courts of justice and other functionaries of our government, if our citizens are at the same time subject to the authority of the officers of another government, over whom we have no control, and who owe to us no official responsibility. It is obvious that all those authorities which go to settle that recapture on fresh suit may be made in another county of the same nation, tend little to settle this question. The case in Connecticut as reported in *Root*, lends no assistance; as in that case the warrant was sanctioned and indorsed by the authority of the state in which it was ultimately executed. It is however urged that by the case, *Nicolls v. Ingersoll*, 7 Johns. 155, it is decided that bail have a right to arrest the principal in another state. From this it is concluded that an officer may do the same.

In relation to that case it is to be observed, that it is understood not to be recognized as law in New York, as some of our citizens have had sad occasion to know. It may be true, though not yet so decided, that inasmuch as the bail is the keeper of the principal at his own request, and is said to hold him as by a string, and may generally circumscribe or enlarge his wanderings, and may arrest even after a voluntary enlargement, he might by virtue of this power and right existing by contract and license between the parties, even arrest in another state. The condition of an officer is entirely different. His power is derived wholly from his official character and his precept, and must on principle cease where his official character and precept cease to have validity and jurisdiction. The same may be said of the analogy mistakenly attempted to be drawn from a right acquired to property, by contract or the laws of the country in which it is situate, remaining good elsewhere. Every government owes protection to its citizens and sojourners, who can not be forcibly taken out of its jurisdiction without the consent of the constituted authorities. For this purpose each state is a sovereign government, and so important and absolute was this

considered that in the second section of the fourth article of the United States constitution provision is made that felons and fugitives from justice are to be surrendered; but even this is to be done only on application to the executive. If our citizens are subject to be taken by the officers of a neighboring state, they are equally subject to be taken and transported to Louisiana or Missouri. Except in those delegations of power invested in the general government, and those restrictions provided in the United States constitution, each state is a national sovereignty, and holds the same relation to the other states which it holds to other nations. As the United States constitution contains no provision on this subject, our citizens are as much subject to the authority and pretended recapture by the officers of England or France as of New York. This suggests consequences entirely at war with all civil liberty, protection, and national independence. We are entirely unprepared to adopt so dangerous and fearful a principle and practice as that for which the defendant here contends.

Judgment affirmed.

BLISS v. ARNOLD.

[8 VERMONT, 252.]

A COMMISSION MERCHANT INTRUSTED WITH GOODS TO BE SOLD FOR CASH, is responsible for their price, if he sells them on credit.

USAGE AMONG COMMISSION MERCHANTS that a sale on a credit of from a week to ten days shall be considered a cash sale, does not affect their customers who have intrusted to them goods for cash sale.

A CASH SALE intends one where the money is paid upon delivery of the property.

WANT OF ALLEGING SPECIAL DEMAND in a declaration, is a defect that is cured after verdict.

ASSUMPSIT. A cask of cheese had been delivered by plaintiff to defendants, commission merchants in the city of New York, to be sold on his account; defendants to retain in case they sold for cash, two and one half per cent. commission; in case they sold on credit, they to guarantee payment, and to retain five per cent. The property was sold to one Carpenter, but no part of the purchase price was ever collected from him, and before the institution of this suit he became insolvent. The action was for the amount for which the cheese was sold, deductions of proper commissions being first made. At the trial, which was before the court, defendants attempted to prove that by a custom among commission merchants in the city of New

York, cash sales embraced sales in which the purchase money was to be paid during the succeeding week, and that this being a sale of that description, they had not, by the terms of their contract, guaranteed payment of the purchase money. The defendants also moved in arrest of judgment upon grounds which appear in the opinion. Plaintiff recovered judgment.

Sargeant, for the plaintiff.

Bennett, *contra*.

By Court, WILLIAMS, C. J. We are all of opinion in this case, that the judgment of the county court should be affirmed. The defendant was justly held accountable for the cheese in question. It is found that the defendant and his partners were commission merchants—that they received the cheese to sell; and that they sold it for cash, and were negligent in not getting the pay therefor. If there was a loss, by the failure of the men to whom the cheese was sold, the loss should fall upon the defendant and not on the plaintiff. In all sales for cash, the money must be paid when the property is delivered. It is wholly inconsistent to claim that a sale for cash means a sale on a credit for a week or ten days. If the commission merchants in New York have adopted such a custom as was contended for and testified to, it must be for their own accommodation, and can not be recognized as obligatory on those who intrust to them property to be sold for cash. We can not believe there is any such custom recognized as law, and we find a decision of Judge Gardner, at the circuit in Monroe county, in the case of *Graves v. Hendrick and Smyth*, directly opposed to any such custom as binding upon the person who intrusts property to a commission merchant.

On the motion in arrest, which was overruled in the county court, it may be remarked, in the first place, that it is doubtful whether any motion in arrest can be sustained when the issue is tried by the court. The court having the whole case before them, it is supposed they would not render judgment on a declaration wholly defective. A motion in arrest is to prevent a judgment, and is filed after a verdict and before judgment. Where the court tries the issue of fact, the finding the issue and rendering the judgment is done at one and the same time.

But on examining the declaration, we do not discover any defects not cured by a verdict. A sufficient consideration is stated in the compensation or commission which the defendant was to receive. The want of alleging a special demand was a

defect, but would have been cured by a verdict. Without proving such a demand, the court would not have permitted the jury, nor would the jury have given a verdict for the plaintiff. It is true the want of stating a special demand, when it is necessary, has been holden bad on a general demurrer, and it has been decided, that it would not be aided by a verdict. The authority of those cases is questionable, and in the case of *Bowdell v. Parsons*, 10 East, 359, the want of alleging such request was held not a sufficient objection in arrest of judgment. When the issue is tried by the court, we are very clear that the objection ought not to prevail in arrest.

The judgment therefore of the county court must be affirmed.

FACTOR ACTING IN CONTRAVENTION OF THE ORDERS OF HIS PRINCIPAL, by his sale of goods, at a price below one fixed for his guidance by his principal, is yet not liable if it appear that no higher price than that of the sale could have been obtained at any time prior to the inception of the suit, and that the sale made was to the actual advantage of the principal: *George v. McNeill*, 26 Am. Dec. 498. As to the extent to which usage among factors will be allowed to limit their liability, see *Goodenow v. Tyler*, 5 Id. 22.

LEWIS v. AVERY.

[8 VERMONT, 287.]

MISTAKE IN THE NAME OF THE PLACE OF IMPRISONMENT will not vitiate an execution issued in a civil case, and so prevent it from justifying an imprisonment at the place that should have been named in the writ.

IMPRISONMENT UNDER SEVERAL EXECUTIONS, SOME OF WHICH ARE VOID, is justified if any one of the executions standing alone would have justified it.

ACTION for assault and false imprisonment. The defendants justified under certain writs of execution. Exceptions were taken to these writs, the nature of which appears in the opinion.

Aikens, for the plaintiff.

Hutchinson, contra.

By Court, COLLAMER, J. To one of these executions the only objection seems to be that the town of Windsor is inserted instead of Woodstock, as the place of imprisonment. This is obviously a mere clerical error, which every man must see, on inspection, and it would be extravagant to say that such a matter should render the precept absolutely void, and make all who were concerned in its issue and execution entire trespassers.

The officer's duty on execution is all particularly pointed out by statute, and he therefore needs not a direction of particulars in the precept. By statute he is directed to commit the debtor to the common jail in the county, which he correctly did in this case. There was no common jail in Windsor, and that word may well be treated as surplusage. It does not become necessary in this case to inquire in relation to the other execution. If the defendants had any legal authority for the imprisonment which the plaintiff shows they committed, it is enough, until the plaintiff shows some excess. The plaintiff has not shown he was ever taken or holden on the other execution alone for any moment, nor has he averred or shown that he was put to any inconvenience thereby, or to any cost or expense to be released from imprisonment thereon. It is therefore of no consequence whether the execution was good or not. The plaintiff's counsel have very strenuously relied on *Adkins v. Brewer*¹ as sustaining a different doctrine. In that case, the officer had taken property on several good executions, and the same property on three void executions, issued by the defendants. He sold the property on all, and paid over the avails to the amount of one hundred and sixty-two dollars to the defendants on these void executions. Here the excess of the officer's act, beyond his good executions, was obvious, and how much injury the plaintiff had thereby sustained. The court sustained the action for this excess, for that which was done on the void process only. Chief Justice Savage says: "The sale by the officer after the other executions were satisfied, could not be justified except upon the authority of these executions; and as they were void, there was no authority, and the defendants were trespassers." This was only for the excess. In this case, the plaintiff having neither averred nor shown anything done him peculiarly and alone by virtue of the other execution, this execution furnished the defendants a legal justification.

Judgment affirmed.

FLETCHER v. EDSON.

[8 VERMONT, 294.]

UNDEXTAKING OF A PRINCIPAL TO PAY HIS SURETY the amount of the demand for which he stands liable, whenever he is called upon for payment by the creditor, or whenever he should have reason to doubt his principal's ability to ultimately save him harmless, is valid and may be enforced upon either of these contingencies arising, though at the time the surety has paid the creditor no part of the debt.

A SURETY IN WHOSE HANDS ARE FUNDS OF HIS PRINCIPAL, created for his indemnity, is responsible to the latter for the same, if they are not needed to effectuate his discharge from liability.

ASSUMPSIT upon a promissory note for one thousand one hundred and fifty dollars, executed by the defendant in favor of plaintiff, to secure the latter from liability on a prior note of the same amount, jointly executed by plaintiff and defendant in favor of one Barnard, such note being signed by plaintiff as defendant's security. On the back of the note sued upon was indorsed a memorandum of the transaction, which concluded as follows: "The said Fletcher is not to demand or sue for the said sum of one thousand one hundred and fifty dollars, or any part of it, unless he, the said Fletcher, is called on for payment of said note, which he has so signed with said Edson, or unless the said Fletcher should have any reasonable doubts of the security of the said Edson, as to saving him, the said Fletcher, good and harmless, at any time and at all times." Plaintiff insisted that reasonable doubt existed as to defendant's ability to save him harmless, and in support showed that Edson had become insolvent, and his property had been attached. Subsequent attaching creditors defended in behalf of Edson. Plaintiff had judgment, and the creditors defending the action excepted.

Marsh and Williams and B. Swan, jun., for the plaintiff.

E. Hutchinson, contra.

By Court, ROYCE, J. As a mere promise to indemnify against an outstanding demand does not furnish a cause of action to the promisee, upon his simply becoming liable to a suit on such demand, and as it did not appear in this instance that the plaintiff had paid the debt or any part of it, his right of recovery might depend on the peculiar terms in which the present contract of indemnity was framed. The contract consists of the note for one thousand one hundred and fifty dollars, payable on demand, controlled and qualified by the stipulation indorsed upon it. Taken together, they amount to an undertaking to pay into the plaintiff's hands, for his security, the whole amount for which he stood responsible for the defendant, whenever he should be called on for payment by the creditor, or whenever he should have reason to doubt the defendant's ultimate responsibility to save him harmless. We discover no sufficient ground for doubting the validity of such a contract. The plaintiff had a right to prescribe the terms on which he would incur a responsibility for the defendant's debt; and his assum-

ing that liability was a sufficient consideration for the defendant's engagement to him. Whatever he receives under this contract, he may be compelled to pay on the foreign demand. To the extent of his means thus acquired, he will have exchanged situations with the defendant—becoming, in effect, the principal, and the defendant a surety. And should the plaintiff be otherwise indemnified and discharged from the foreign debt, he must refund the fruits of this action. The record will at all times exhibit the nature of the claim now asserted by him, and the purpose for which it is sustained.

It is insisted that the rights of the defendant's other creditors should control the plaintiff's remedy under this agreement. But to allow this would be to expose the plaintiff to a heavy loss, by depriving him of that security without which he probably would not have made himself accountable: it would be to abrogate the most important part of his contract. The statute has enabled these creditors to urge every legal defense to the action—every defense of which the defendant, if disposed to contest the right of recovery, could avail himself, either for his own benefit, or that of his other creditors. This is the only privilege conferred by the statute, and with this the creditors must be satisfied.

Judgment of county court affirmed.

RIGHT TO SUE FOR INDEMNITY ACCRUES, WHEN: *King v. Harman*, 26 Am. Dec. 485; *Marshall v. Colvert*, 27 Id. 589; *Chace v. Hinman*, 24 Id. 39, and note 44.

SURETY HAVING IN HIS HANDS FUNDS created for his indemnity, must account for the surplus not required for that purpose to his principal's creditors: *Ripley v. Severance*, 17 Id. 397.

BRYANT v. EDSON.

[8 VERMONT, 325.]

LEX LOCI CONTRACTUS, which in their case is that of payment, regulates the existence of days of grace.

THE PLACE OF EXECUTION OF A JOINT PROMISSORY NOTE where the first maker signs in Massachusetts, the second in New Hampshire, will be the former state, where, in addition to the fact of its execution there by the first maker, the note bears date in that state, and it was there that its consideration passed.

A CONTRACT TO PAY GENERALLY is governed by the law of the place of its execution, though collectible elsewhere.

ACTION on the following promissory note:

"\$1456.67.

CAMBRIDGE, January 2, 1834.

"For value received, we promise to pay Sylvanus Bryant or order, fourteen hundred and fifty-six dollars and sixty-seven cents, in fifteen days from date.

REUBEN DAMAN.

SYLVESTER EDSON."

The writ in this action was served on Edson on the twentieth of January. Edson defended upon the grounds that he was entitled to days of grace that had not elapsed at the time that this action was begun. Verdict and judgment was had for defendant, upon a rule being entered into by him that should the supreme court be of opinion that he was not entitled to grace, judgment should be entered for plaintiff for the amount of the note and costs.

T. Hutchinson, for the plaintiff.

Marsh and Williams, contra.

By Court, COLLAMER, J. The obligation of a contract—the duties it implies, and the manner in which it is to be performed, are fully acknowledged to be regulated by the *lex loci contractus*; while the manner of enforcing the remedy, in case of breach, constitutes no part of the contract, and is regulated by the *lex loci fori*. This is a distinction apparently clear, but frequently difficult of practical application. That days of grace are a part of the contract—a part of its obligations and privileges, and therefore to be regulated by the *lex loci contractus*, has been decided, and does not seem to be now much controverted: Story on Conf. L. 299. This is regulated by the law of the place where the instrument is payable. In this case, the contract was made in Massachusetts, and there the consideration passed; but the payee belonged to New Hampshire. It has sometimes been suggested that this varies the case; but the law makes no distinction on that account. "Every contract, whether made between foreigners, or between foreigners and citizens, is deemed to be governed by the law of the place where it is made and is to be executed:" Story Conf. L. 233. After this contract was made in Massachusetts, it was brought to Vermont, and here the defendant, Edson, underwrote it.

Where, under these circumstances, is it to be considered as having been made? It was made in Massachusetts; there the consideration passed; there it bears date; there it was delivered to the plaintiff, and it was afterwards signed by Edson here.

There can not be different obligations on the two signers; and as the place of date was not colorable, this defendant executed the contract with reference to the law of the place where the transaction actually took place, and where the note bore date. Suppose a note was actually made in New York, for money there had, and afterwards that note were underwritten by a surety here. Most unquestionably either of those signers would be subject to the payment of seven per cent. interest.

This then must be considered a contract made in Massachusetts. But, as already shown, the days of grace are regulated generally by the place of payment. This note has in it expressly no place of payment. It is a promise to pay, generally. By what law are such contracts governed? Where are they considered payable? It has already been shown the residence of the parties does not govern it. "A contract to pay generally is governed by the law of the place where it is made; for the debt is payable there as well as in any other place. To bring a contract within the general rule of the *lex loci*, it is not necessary that it should be payable exclusively in the place of its origin. If payable everywhere, then it is governed by the law of the place where it is made; for the plain reason that it can not be said to have the law of any other place in contemplation to govern its validity, obligation, or interpretation. All debts between the original parties are payable everywhere, unless some special provision to the contrary is made; and therefore the rule is, that debts have no *situs*. The holder takes the contract as it was originally made, and as in the place where it was made:" Story Conf. L. 264. This note must then be governed by the law of Massachusetts, where it was made. And this brings us to the single question, is grace allowed on such a note by the law of Massachusetts?

It is insisted by the plaintiff's counsel, that in order to have grace, the note must, upon its face, expressly be payable in Massachusetts. This argument arises wholly from a mistaken reading of the Massachusetts statute, in the argument for the plaintiff. The plaintiff's counsel quote the statute as if bills, notes, drafts, etc., were all put on the same footing; but this is not so. The first clause of the statute, and in which alone the word expressed is used, relates exclusively to bills of exchange. The latter clause of the statute relating to negotiable notes, orders, or drafts, gives grace on all payable on a future day certain, within the state. This includes all, whether expressly or exclusively payable there, or, by being actually made there

and payable on time, generally, are by the general law payable where made, as already shown; and so includes this note. We have been favored with no decision by the courts in Massachusetts on this statute; but we entertain no doubt such is its practical construction, and that grace is there constantly allowed on such notes.

Judgment affirmed.

MORRIS v. HYDE.

[8 VERMONT, 352.]

TEMPORARY CHANGE OF POSSESSION upon a sale of personal property, followed by an immediate return of possession to the vendor, will not protect the property as against the latter's attaching creditors.

POSSESSION REDELIVERED TO THE VENDOR BY THE AGENT OF THE VENDEE, in whose possession the property is, though unauthorized, will, if made in close proximity to the sale, let in the vendor's subsequent attaching creditors.

TROVER. A mare had been purchased from Abel Wilson by plaintiffs, and had been thereupon turned over by them to Walker to keep for them. The next day Wilson borrowed the mare from Walker, to go on a journey. While yet in his possession, during the ensuing twenty-four hours, the mare was attached by defendant, a creditor of Wilson. Defendant attempted to prove that the sale to plaintiffs was fraudulent, and that the return of possession of the property to Wilson was with plaintiff's consent.

The jury was instructed, amongst other things, that if they found the sale to be in good faith, a subsequent possession of the property obtained by Wilson from Walker, without plaintiffs' consent, would not render the property liable to the claims of Wilson's creditors. There was judgment for plaintiffs.

By Court, **PHELPS, J.** The rule which requires a substantial visible change of possession, in order to enable the purchaser of a chattel to hold it against the attaching creditor of the vendor, is too well settled in this state, by repeated adjudications, to admit of further discussion. The possession taken, must be such as will indicate to the world at large the change of ownership. A mere temporary change, if the property revert immediately into the possession of the vendor, is not sufficient. In this case, we are of opinion, that the temporary possession of Walker, as agent of the plaintiffs, was not such as answers the requirement of the law. Had the horse been returned to the possession of Wilson, with the assent of the plaintiffs, it seems

to be admitted, the title of the plaintiffs could not be sustained. But it appears in this case, that such assent was not had, and it is argued, that the act of the agent being unauthorized by the plaintiffs, they are not to be affected thereby.

It is true, as a general rule, that a party is not to be made responsible for any positive act of another, unless done by his authority or direction, express or implied. But it is also true, that where an act is necessary to consummate or perfect the right or title of a party, and such act is omitted, through the neglect or disobedience of an agent, the party who commits his rights to the fidelity of such agent must bear the consequences. In this case, it was the duty of the plaintiffs to see that their purchase was followed by a sufficient change of possession, and if they intrust the business to an agent, they are responsible for the agent's fidelity. Had the possession been taken and retained by the plaintiffs, in such manner, and for such length of time, as would have answered the requirements of the law, and the property had then been intrusted to the vendor, temporarily and for a special purpose, the case would have fallen within the doctrine of *Farnsworth v. Shepard*, 6 Vt. 521, cited in the argument.

Judgment reversed, and cause remanded to the county court.

CHANGE OF POSSESSION upon sale of chattels must be continued, to protect the title as against subsequent purchasers: *Fletcher v. Howard*, 16 Am. Dec. 686.

WINOOSKIE TURNPIKE COMPANY v. RIDLEY.

[8 VERMONT, 404.]

A DEPOSITION ALTERED IN A MATERIAL PART by the magistrate before whom it was taken, the party deposing not being present at the time, is inadmissible, nor can it be aided by parol proof as to the manner in which it appeared before the alteration.

TRESPASS for burning plaintiffs' bridge. In behalf of defendant the deposition of Dan Corss was read. In the deposition, as it originally read, Corss testified to a conversation which occurred between himself and French, on the bridge between Waterbury and Duxbury. After the deposition was sworn to, and Corss had left town, the justice before whom the deposition was taken, apprehensive that he had taken down Corss' evidence erroneously as to this particular, changed the above word "on" to "at." At the time when Corss testified that the conversation referred to occurred, no bridge between Waterbury and

Duxbury had yet been erected. The above facts clearly appeared from the parol evidence offered on the trial. Plaintiff objected to the reading of the deposition; the objection was overruled, the jury being instructed to consider the deposition as it stood before the insertion of the word "at" in the place of "on." Plaintiffs excepted.

By Court, PHELPS, J. The deposition of D. Corss was offered in the county court, and objected to, upon the ground that it had been altered by the magistrate taking the same, after it had been signed and sworn to, and without the knowledge or assent of the deponent, by erasing the word "on," and inserting the word "at." This objection, although well founded in fact, was overruled by that court, and the deposition admitted. To this decision the plaintiffs excepted.

Depositions are a species of evidence in suits at law altogether unknown to the common law. They are not used in England and many of our sister states. They are, moreover, a species of evidence of a most unsatisfactory character, and should always be received with the utmost caution. The legislature have guarded them with great care, and the courts have rigidly enforced all the safeguards which the legislature have established. The statute requires that they shall be signed by the deponent, as well as sworn to. The object of signing is doubtless to make the deponent responsible for the phraseology of the deposition; for, by signing, he adopts the language as his own. Had the statute required that the magistrate only should sign the paper, the committing the testimony to paper might be considered the act of the magistrate, and the peculiar language used might perhaps be considered as his. In such a case, it might be competent for the magistrate, so long as the paper remained under his control, to correct the phraseology according to his understanding of the purport of the testimony. But, under the statute, the language of the deposition must be considered as emphatically the language of the witness, and he alone is responsible for its correctness.

If, then, a deposition be altered, in a material part, after it is signed and sworn to, it is no longer the thing sworn to, and the witness is no longer responsible for it. He certainly could not be convicted of perjury, if the alteration renders it false; and thus the legal sanction, upon which the legal character of the testimony depends, is removed. In short, the paper so altered is no longer the testimony of the witness, and can not be regarded as such. But it seems that the court, in this instance.

permitted the deposition to go to the jury, accompanied with proof of its original tenor, and instructed them to regard it as evidence, in the terms in which it was originally written. Had the original expression been still legible, there might have been some plausibility in this course. But the writing, in this instance, was wholly obliterated, and its original tenor not discoverable upon inspection of the paper. Parol proof was resorted to, in order to ascertain the testimony of the deponent. The proof was therefore no better than hearsay. The evidence did not consist in the written deposition, signed and sworn to by the witness, with all the forms, and under all the safeguards provided by the statute, but in the testimony of third persons as to what the witness testified before the magistrate.

Another most satisfactory reason for rejecting the evidence, is to be found in the extreme danger of suffering the magistrate thus to tamper with the instrument. Every consideration of general expediency, as connected with the elucidation of truth, and with safety in the administration of justice, forbids it. To admit this evidence would be unsafe in the particular instance, and dangerous in the last degree as a precedent. It is urged, however, that the alteration in this case is immaterial. It was doubtless considered otherwise by the magistrate who made it, as well as by the attorney of the party with whose concurrence it was done. And, in our opinion, it is so in fact. The word "on" implies, not only that the bridge was standing, but also that the witness was on it when the conversation testified to took place. If the bridge was not in existence at the time, the circumstance certainly establishes an inaccuracy in the particular of either time or place. How far this might have impaired the credibility of the witness, in the minds of the jury, is not for us to determine. It certainly had such a tendency; and if so, it was material; whether in a greater or less degree, is unimportant. Whether an alteration, in no sense material, as a correction of errors in orthography, or grammatical expression, would vitiate the deposition, is a point not before us, and which we do not decide. But we are all agreed, that an alteration by the magistrate, after the deposition is signed and sworn to, without the assent of the deponent, in a particular in any sense material, is fatal to the evidence.

Judgment of county court reversed, and cause remanded.

LAMB v. DAY ET AL.

[8 VERMONT, 407.]

A SHERIFF ATTACHING A CHATTEL BECOMES A TRESPASSER AB INITIO if he afterwards make use of the chattel instead of simply retaining it in custody.

A CREDITOR AT WHOSE INSTANCE A CHATTEL IS ATTACHED becomes, together with the attaching officer, a trespasser *ab initio* where there is a subsequent delivery of the chattel to him by the officer, and a subsequent use of the same by him.

MITIGATION OF DAMAGES IN TRESPASS FOR SEIZURE UNDER VOID ATTACHMENT.—Where an attachment was vitiated by subsequent acts of the creditor and sheriff attaching, they were permitted in trespass for seizure to show that in the attachment suit judgment was finally obtained, and thereupon the property seized under the attachment was sold on execution and the proceeds from the sale applied on the judgment.

TRESPASS. In a prior suit brought by Day against Lamb, a mare belonging to the latter was attached, by virtue of a writ of attachment procured by Day. Peck, the officer who levied the attachment, and a defendant herein, afterwards delivered over the mare to Day, who thereupon proceeded to use her on a stage. Judgment was finally obtained by Day in his suit against Lamb, and the mare was then sold on execution and the proceeds applied on the execution. The present plaintiff claimed in this action sixty-nine dollars, the value of the mare attached, because of said transactions. Defendants, on the other hand, insisted that plaintiff's recovery, if any, could be only of nominal damages, because of the subsequent sale of the property on execution, and the disposition of the avails of that sale in diminution of the judgment obtained against plaintiff. The other facts of the case need not be stated. The court below disregarded defendants' claim that the damages be mitigated for the reasons above stated, and gave judgment for the value of the mare.

A. Kinsman, for the plaintiff.

L. B. Peck, contra.

By Court, PHELPS, J. There is no doubt that the use of the horse, by the defendant Peck, was a tortious act. The authority of a sheriff, with respect to property attached, extends only to the safe custody of it. He has no interest in it, except to retain it as security for the creditor: and whenever the use of it would impair its value, to permit such use would be to inflict an injury upon one or the other of the parties, without a corresponding benefit to either. There are indeed cases, where the use of a

chattel might compensate for the expense of keeping it; and in such cases there is a plausibility in permitting it. But as a general rule, it would be extremely unsafe and pernicious: and, inasmuch as there is no provision by law for adjusting such an account between the parties, we are not at liberty to countenance a proceeding so prolific of embarrassment and difficulty. That the using the property by Peck, in this instance, would render him a trespasser *ab initio*, is a point too well settled to require discussion.

It is however insisted, that Day, the other defendant, can not be made a trespasser by relation. This depends upon the question, whether he is to be considered as implicated in the original taking. If he is not, then certainly no subsequent tortious act of his could make him a trespasser in that respect. There is a strong presumption however in the outset, of his concurrence in the attachment made by Peck; and his subsequent adoption of that act, by taking the horse into his possession, and subsequently selling it on the execution, afford sufficient evidence of his participation. Being implicated in the original taking, the authority of the process was as necessary for his justification as for that of Peck; and whatever would defeat that justification, would, of course, subject him to this action. Had the subsequent tortious act been the act of the officer alone, without the assent or concurrence of Day, there would be good ground to argue that he, Day, would not be affected by it. But as the act complained of was the concurrent act of both the defendants, they are equally implicated. The justification being equally necessary for both, as to the original taking, and that justification being unavoidable, by reason of their joint act, the consequences must be the same as to both.

The case of *Van Brunt et al. v. Schenck*, 11 Johns. 377, illustrates the distinction. Upon the first trial of that case, Schenck, not appearing to have participated in the original seizure, was held not to be a trespasser by relation. If a trespasser at all, it was only in the subsequent use of the vessel. But when, upon the second trial, his concurrence in the seizure appeared, he was held to be a trespasser *ab initio*, in the same manner as his deputy, Van Buren, who made the seizure in fact. In short, if Day had not been concerned in the first taking, he could be made a trespasser only by reason of the subsequent tortious use of the property; and in this view the action might fail for want of a right of possession in the plaintiff at the time. So if he had no agency in the after use of the animal, it might be ques-

tioned whether he could be made a trespasser, by relation, by the act of the officer. But concurring, as he did, in both the acts, it is impossible to distinguish between him and his co-defendant.

The plaintiff's right of recovery being sustained, the next inquiry relates to the rule of damages. Generally, the extent of the injury sustained is the criterion of damages. The value of the property taken, is not necessarily the minimum of damages. Whether it is so or not, in any case, depends upon the inquiry, whether the chattel is wholly lost to the party. If not, then the rule of damages must conform to the actual injury under the circumstances of the case. In this case, the horse is not lost to the party; but its value, at the time of the sale upon execution, has been applied in satisfaction of his debt; and the extent of the injury depends upon the comparative value of the animal at different periods. If the value has been reduced by the transaction in question, the plaintiff has been injured in a comparative degree. But whether this injury be more or less, is a question for the consideration of the jury. It seems to have been supposed, that, inasmuch as the justification fails, none of the proceedings are proper to be considered in mitigation of damages. This is a mistaken view of the subject. The distinction between a full justification and matter of mitigation, is obvious and palpable; and it is no answer to matter, which has a legitimate tendency to mitigate damages, that it falls short of a full justification. Placing the liability of the defendant upon the footing of the original taking, as an act of trespass, still the ultimate disposition of the horse is material to the question of damages; and as the property was applied in satisfaction of the plaintiff's debt, that circumstance serves to reduce the damages accordingly. This view of the subject is sustained by the cases cited by the counsel: See 5 Car. & P. 332;¹ 6 Mass. 20;² 1 N. H. 91;³ and is so obviously equitable in its result, in this case, that we hesitate not to adopt it.

The county court having given the full value of the horse, we consider their judgment erroneous. It is therefore reversed, and the cause remanded.

ACTS OF AN OFFICER ARE CONSTITUTED A TRESPASS, by what subsequent acts: See *Baumgard v. Mayor*, 29 Am. Dec. 437 and note.

1. *Knotts v. Curtis*, 5 Car. & P. 322.
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2. *Prescott v. Wright*.

3. *Blake v. Johnson*.

STATE v. DOWNER.

[8 VERMONT, 424.]

AN OFFICER SEIZING UNDER ATTACHMENT property not that of the defendant, can not be lawfully resisted by the real owner, if he had at the time reasonable cause to believe the property to be that of the defendant in the attachment suit; and did under such belief attempt the seizure in good faith.

AN INDICTMENT FOR IMPEDING AN OFFICER in his execution of civil process must show the nature of the process, so far that the court may see whether it was legal, and that the officer had authority to serve it, and the mode of resistance should be set out, as also that in which the process was attempted to be executed, and also it must appear from it that the persons impeding the officer knew of the character in which he acted.

ASSAULT OF AND RESISTANCE TO AN OFFICER acting in the execution of his powers as such, is an offense indictable at common law

AN OFFENDER MAY BE PROCEEDED AGAINST AS AT COMMON LAW, though a statute has superadded to the offense a higher penalty.

INDICTMENT for resisting an officer in the execution of his process. The indictment was as follows: "The grand jurors, etc., present that John B. Downer, etc., and one Archippus Fuller, etc., on the twenty-eighth day of September, A. D. 1835, with force and arms, etc., in and upon one Stillman Churchill in the peace then and there being, and then being constable of Stowe, in the county of Washington aforesaid, and in the due execution of his said office, then and there being, did make an assault, and him, the said Stillman Churchill, so being in the due execution of his said office as aforesaid, then and there did hinder and impede, and then and there beat, wound, and ill-treat, and other wrongs to the said Stillman Churchill, then and there did, to the great damage of the said Stillman Churchill, and against the peace. And the jurors aforesaid, upon their oaths aforesaid, do further present that the said John B. Downer, and the said Archippus Fuller, on the day and year last aforesaid, at Stowe, in the county of Washington aforesaid, with force and arms at said Stowe, in and upon one Stillman Churchill in the peace then and there being; and the said Churchill then being constable of Stowe in the county aforesaid, and having in his hands certain writs of attachment to serve and return according to law, and then and there being in the due execution of his said office of constable as aforesaid, then and there did make an assault on him, the said Stillman Churchill, etc., then and there did impede and hinder, and then and there did beat, wound, and ill-treat, and other wrongs to the said Stillman Churchill then and

there did, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state." In behalf of the prosecution, evidence was offered that said Churchill, the constable of Stowe, having taken in his possession certain property under writs of attachment in his hands, issued against Myron Fuller, defendants had made upon him the assaults complained of. Defendants offered evidence to prove that their acts were done in defense of the possession acquired by Thomas J. Raymond, under prior writs of attachment issued in favor of defendant Downer, said Raymond being legally authorized to serve said writs, and defendants acting as his assistants. They also offered to prove a conveyance of the property, prior to the attachment, by Fuller to Downer. The court below decided the evidence inadmissible unless offered in support of the position that Churchill, at the time that he made the attachment, knew that Fuller had no attachable interest in the property, or else to show that said Churchill, in making the attachment, acted in bad faith. As defendants contended for neither of these positions, the evidence was rejected. Defendants were found guilty.

A. Spalding, for the state.

Upham, *contra*.

By Court, REDFIELD, J. We think the testimony offered by the defendants was properly rejected by the county court. It is well settled that one may defend the possession of his property against a stranger with such force as may be necessary. But this right can not be extended to the case of an officer whose duty it is to attach property whenever he is requested so to do. He may or may not require indemnity for the act. But it would be too much to say that he must decide all cases of doubtful property at his own hazard, or that if he attempted to make an attachment when the property was not in fact in the debtor, he might by the owner of the property be resisted to any extremity. The rule would be the same when he called out the *posse comitatus*, and the question whether the officers of justice, or the rioters, shall be held liable to indictment, must depend upon the decision of some abstract question of property, which the sagacity of no man was sufficient to foresee. And if the owner of property may resist an officer in its defense, so may one who believes himself the owner; for it will not do to predicate crime upon so subtle a distinction as an abstract right of property. It must be something more tangible. We

believe the better and safer and only practicable rule to be, that whenever the question of property is so far doubtful that the creditor and officer may be supposed to act in good faith in making the attachment, the owner of the property even can not justify resistance, but must yield the possession and resort to his remedy by action. This is the only mode in which the question could be tried. And unless such a rule be adopted, no human sagacity is adequate to the decision of those nice questions which the duty of sheriffs and their officers involves. The rule here established does not impugn that which is found in the books, "that an illegal arrest may be resisted." If the process is void, or is misapplied, it is the same as if there were no process, so far as one's person is concerned. But the case of property is very different. It depends upon *criteria*, which are not the objects of sense. It is well settled that if an officer have probable cause to suspect one of felony, he may proceed to arrest him by any force necessary, and is justified, notwithstanding the person shall prove to have been innocent: 2 Hale, 79; 1 East P. C. 301; *Samuel v. Payne*, Doug. 359; 1 Russ. on Crimes, 504.

The question of the sufficiency of the indictment is all that remains. If either count in the indictment be good, the motion in arrest can not prevail. The second count in the indictment, which goes upon the statute, is manifestly defective. The process should have been so far set forth, that the court could see that it was legal, and that the officer had authority to serve it. All the authorities, too, concur in requiring that the bill should contain an allegation of the particular mode of resisting the officer. And no doubt the mode in which the process was attempted to be executed, should be specifically set forth. And it should be alleged that the respondents knew of the character in which the officer claimed to act. For all these reasons, the second count in the bill is bad. The first count is for an assault upon the officer in the execution of his office. This does not conclude against the statute, and is strictly for an aggravated assault at common law. And it is too well settled to be discussed, that an assault and resisting one in the execution of any authority or power, is indictable at common law, and all the precedents of indictments for such offense are like the present. We think this count good as for an offense at common law. And as the statute has only superadded the higher penalty for the offense, this does not take away the right to proceed against the offender for the offense, as at common law,

which can only be punished with fine and imprisonment in the common jail: Doug. 445;¹ 2 Ohit. Crim. L. 70; 1 Russ. 48; 2 Hawk. 625, sec. 4; *King v. Dickenson*, 1 Saund. 135 a (4); 2 Salk. 46.² This count is in strict conformity with the precedents found in the English books: 2 Ohit. 596, and cases cited. Arch. Pl. and Ev. 302.

The judgment of this court is, that respondents take nothing by their motion or exceptions, and judgment was rendered against the respondents.

WHERE A PENAL STATUTE IS ONLY DECLARATORY of the common law, an indictment framed for the offense described by it, need not conclude *contra formam*: *People v. Enoch*, 27 Am. Dec. 196.

HALL & Co. v. BROOKS.

[8 VERMONT, 485.]

THE RULE OF DAMAGES IN AN ACTION AGAINST A SHERIFF for neglecting and refusing to levy or return an execution, is the amount for which the execution was levied, and the measure of recovery can not be diminished by proof that the circumstances of the execution debtor were such that the execution would have answered nothing if levied.

CASE against defendant, sheriff of Essex county, for his neglecting and refusing to levy or return an execution issued in plaintiffs' favor. Judgment went by default. The assessment of damages being by consent of the parties, by the court, defendant offered, for the purpose of reducing the damages, the evidence mentioned in the opinion. The evidence was rejected, and judgment given against defendant for the entire amount of the execution.

J. Mattocks and Heywood, for the plaintiffs.

Cushman and Wead, *contra*.

By Court, REDFIELD, J. In this action, the county court gave judgment for the whole amount of debt and cost in the original execution, notwithstanding the defendant offered evidence to show that the debtor was, at the time of the neglect, wholly unable to respond the amount, or any part of it. If the testimony was relevant, then the judgment is erroneous. At common law, no such action, as the present, could be sustained against an officer, the only remedy being the process of the rule of court and amercement for contempt. But the action is expressly

1. *King v. Smith*.

2. *Anonymous*.

recognized by our statute, but nothing is there to be found in relation to the rule of damages. But the defendant claims the right of giving the evidence offered, and thus reducing the damages below the amount of the execution, as a universal common law right, in reference to all actions of this character. In actions for escape on mesne process, and for refusal to serve mesne process, as the debt can not be transferred to the officer, by the judgment, the rule of damages claimed by defendant in this case has been adopted. But where an officer has final process put into his hands, which he refuses or neglects to receive, it has always been held, that he thereby made the debt his own, and was liable in damages to the full amount of the debt.

The question is not new. It was so held by the court in the case of *Turner v. Lowry*, 2 Aik. 72, where judgment was rendered for plaintiff to recover the full amount of his execution. In the case of *Buckminster v. Fuller*, decided in Caledonia county, March term, 1832, the point now in judgment, was fully considered and decided, as we now hold. There is a case within the recollection of some members of the court, decided in Franklin county, in which it was held, that the sheriff was liable in an action for escape from the liberties of the jail, for the full amount of the debt, and could not give in evidence either the poverty of the debtor or the solvency of the bondsman at the time of executing the same, they having subsequently become wholly insolvent. These decisions and the long and uniform practice in all our courts of allowing full damage, we think, give to the rule the force of law. That the case is, in some respects, similar to that of an action for escape on mesne process is not to be denied. But that is not the same case. If the debtor has once been in custody, the object of imprisonment has been in some measure answered. Imprisonment for debt is only intended to operate to induce a surrender of the debtor's property. If it fails in producing that effect, in the first instance, it will usually always fail. But the case is quite different, when the officer chooses to take the law into his own hands and peremptorily refuses, or what is the same, wholly neglects to serve the process of the court, to which he is bound, and which the creditor has a perfect right to insist upon; we can not feel that in this view the rule of law here recognized is a hard one. A contrary rule would certainly be very much at variance with sound policy, inasmuch as it must lead directly to encourage in officers, neglect of duty and tam-

pering with debtors and their friends, which is not within the legitimate scope of their duties.

Judgment is affirmed.

In *Kidder v. Barker*, 18 Vt. 454, a sheriff sued for not returning an execution, was held liable for no more than nominal damages, because neither the body nor property of the execution debtor was within his bailiwick. It was further held, that in the absence of any proof upon these facts, they would be intended in favor of the sheriff. The court, in delivering the opinion, held the case not to be fairly comparable with the principal case, but notwithstanding it certainly seems to work a restriction upon the harsh rule of the principal case.

In other states, a milder doctrine than that of the principal case prevails. This doctrine is that a sheriff sued for not returning an execution, is indeed *prima facie* liable for the amount of the execution debt, but that he may show, in mitigation, the insolvency of the debtor, or any other fact which would have destroyed the availability of the execution: *Weld v. Bartlett*, 10 Mass. 470; *Bank of Rome v. Curtiss*, 1 Hill, 275; *Pardee v. Robertson*, 6 Id. 550; *Bowman v. Cornell*, 39 Barb. 69; *Moore v. Floyd*, 4 Or. 101; *Dolson v. Saxton*, 18 N. Y. Sup. Ct. 565; *Harris v. Murfree*, 54 Ala. 161. Statute provisions, in many of the states, have established inflexible rules to be applied in determining in such cases the amount of damages: See *Freeman on Executions*, sec. 368, where these provisions are collected.

PIERSON v. GALE ET AL.

[8 VERMONT, 509.]

PROCESS REGULAR UPON ITS FACE, justifies all acts of an officer done in its execution.

EXECUTION ISSUED ON A JUDGMENT PAID, BUT NOT RELEASED OF RECORD, where such issue has been obtained by third parties, without the concurrence of the judgment creditors, will render those parties liable in trespass for the acts done under the process.

CASE IS THE PROPER REMEDY FOR ACTS DONE IN ABUSE OF PROCESS regular upon its face.

TRESPASS for false imprisonment. In an action by Lee against plaintiff and Johnson, a defendant herein, judgment was recovered, and execution issued. The execution, however, was not levied, and the writ was turned over by Lee to Johnson, in pursuance of an agreement, under which Lee discharged the writ in consideration of his discharge by Johnson from certain claims held against him by the latter. Afterwards, defendant Gale, acting with the privity and consent of Johnson, and with knowledge of the settlement between Lee and Johnson, returned the writ to the justice by whom it was issued, and caused an *alias* writ to issue, under which plaintiff was taken. The jury were instructed that plaintiff was entitled to a verdict

in case they found such a state of facts to exist. Verdict and judgment for plaintiff.

Starkweather, for the plaintiff.

Cooper, contra.

By Court, REDFIELD, J. The question to be determined here is, how far final process, sued out after the judgment had been paid, but not released or discharged of record, and without the concurrence of the creditor, will operate as a justification to those claiming to act under it. An execution issued to enforce the payment of a judgment after it had been once paid, may, no doubt, be a sufficient justification in trespass to the officer and his assistants. He is never bound to look beyond the process. If that is regular upon its face, it is sufficient for him and all those who act under him. And unless the payment were entered of record, or the fact made known to the clerk, he clearly could not be made a trespasser on account of the issuing of the execution. But in the present case, the execution had been paid and surrendered to the debtor, as evidence of such payment. The case must be considered the same as if the execution had been released or discharged by the creditor, either upon another or the same paper; and if upon the same, the payment or indorsement erased. In such case, it could hardly be contended, that the second execution could be any protection to the party. It must be admitted on all hands, that if the satisfaction of the execution appeared of record, the clerk even would be a trespasser for issuing a second execution, and this upon the ground that the second execution would be irregular and void. But when the payment has not been applied upon the execution, or the execution surrendered to the defendant to be destroyed or kept by him, or some other unequivocal act done to indicate the consent of the parties to treat the execution as satisfied, it might be more in accordance with principle, and certainly with decided cases, to leave the party to his remedy, by a special action of trespass on the case. Indeed, so closely do the cases upon this subject tread upon the heels of each other, that it is almost impossible to find any satisfactory and intelligible ground of distinction between trespass and case for acts done under color of process. The same act in different states of the American union is declared to be, and not to be a trespass. In Massachusetts, it is held, that if an execution issue before the day on which the party by law is entitled to it, the party suing it out is liable in trespass for all injury sustained

by the debtor: *Briggs v. Wardwell*, 10 Mass. 356. And in the case of *Blaine v. Charles Carter and Donald*, 4 Cranch, 328, the court wholly disregard such an exception, upon the ground that it should be first set aside by application to the court from which the execution issued.

Upon the same ground, the court in New Hampshire refused to sustain trespass, where an execution was issued by a justice of [the] peace against the body of the debtor, in a case where by law no such execution could issue: 2 N. H. 491.¹ And in Maine, precisely the same point was decided just the reverse: 5 Greenl. 291.² Where the exemption claimed is mere privilege of the party or court or other body, the party can never sustain trespass for an arrest in violation of the privilege, but must resort to his action upon the case. In *Wood v. Kinsman et al.*, 5 Vt. 588, it was held that where the debtor was arrested on an execution after having been admitted to the poor debtors' oath, he could have no remedy by action of trespass and false imprisonment. (The same question has been decided otherwise in Maine and some of the other states.) The distinction then between cases where trespass will lie, and those where it will not lie, is not very distinctly marked. It is said in the old cases, *Parsons v. Lloyd*, 3 Wils. 341; *Barker v. Braham and Norwood*, Id. 376, and cases there cited, that when the judgment on the writ is irregular, and not merely erroneous, and has been set aside for such irregularity, that all acts done under color of the execution of such judgment or writ, are the same, so far as the party is concerned, as if the judgment or execution had never existed. The same distinction has been repeatedly recognized in this state, and is no doubt founded in solid, sound sense. If the act is one of judicial discretion, the court is never liable in any form of action for a mere error of judgment. If the court is not liable, surely the party should not be for the act of the court. And the officer is never bound to look beyond the face of the precept or process under which he acts. If that be regular, it is always sufficient for him and for his assistants. And I apprehend, that although it should afterwards be set aside for some irregularity not apparent on the face of it, the officer and his aids could never become trespassers for any act done under the process. It is equally well settled, that whenever the process is regular, and issues from a court of competent jurisdiction, neither the officer nor party are liable in trespass for any mere abuse of the process, how-

1. *Blanchard v. Goss*.2. *Green v. Morse*.

ever groundless or malicious their proceedings may be, but the appropriate remedy is case: *Watson v. Watson*, 1 Conn. 148;¹ 1 Chit. Pl. 188. For if the execution has been paid in any collateral manner, or perhaps in money, but no application made upon the execution, and the party sue out a second execution, he is not thereby a trespasser, but the proper remedy is by *audita querela*, or an action on the case: *Luddington v. Peck*, 2 Conn. 700, and cases there cited. The same doctrine is held in the case of *Brown v. Feeler*, 7 Wend. 301.

But where the payment appeared of record, no doubt the clerk and the party would be liable in trespass, for here the issuing of an execution would be irregular, and all persons concerned in issuing it are trespassers. If the application had been once made but fraudulently erased by the party, or if the execution had been paid and surrendered to the debtor as evidence of payment, and then surreptitiously purloined by the party and a second execution sued out, we incline to the opinion that the party must be treated as a trespasser, the same as if he had sued out the second execution while a satisfaction of the first appeared of record, or while the first execution was in the hands of the debtor, and not returned into the office of the clerk. But as that is not the present case, we do not incline to decide it. But in the present case the execution was sued out by one of the debtors and a mere stranger, and in no sense can these defendants connect themselves with the process, so as to claim protection under it. They are not the creditors, or the agents, or attorneys of the creditors, but act wholly without the knowledge, and independent of the creditor. A mere stranger who had resolved upon committing a trespass, might just as well purloin a writ from some attorney's office and procure the authority signing the writ, to depute him to serve it, and then claim to have proceeded in the execution of this precept, in which he had no interest directly or indirectly, and over which he had no control: 5 Wend. 237.² In *Green v. Jones*, 1 Saund. 300, it is held that, to a plea of justification under process, it can not be replied by the plaintiff that defendant did not do the act by virtue of the process, for this is not a traversable or issuable part of the plea. If the party have such process and it issued regularly, all acts done in the apparent execution of it are to be referred to it, of course on the ground of legal courtesy, or that charity will put the most favorable construction on a man's acts. But surely the exist-

1. 9 Conn. 140; S. C., 23 Am. Dec. 324.

2. *Merrill v. Nor.*

ence of the process, and the manner of its being prayed out, may be put in issue. In this case it is not true that Lee, the creditor, sued out this execution, nor is it true that the defendants, or their agents or attorneys, or as assignees of the debt, sued out the writ, for the debt was extinguished and not assigned. For this reason then as well as the former, we are satisfied that the execution issued irregularly, and that the defendants have no color of pretense to justify their proceeding under it.

The case of *Luddington v. Peck*, 2 Conn. 700, and that of *Watson v. Watson*, 9 Id. 140 [23 Am. Dec. 324], are certainly very strong cases in favor of defendants; and much stronger than any others to be found in the books. The latter case is one indeed of very questionable authority, and they are not in point. In neither of those cases was any such want of authority shown in the party attempting to justify as in the present. The case of *Turnor v. Folgate*, Raym. 73, referred to by Chief Justice Swift, in the case of *Luddington v. Peck*, is one which could not be recognized as law here. There the creditor, after having sued out and levied one execution, sued out a second execution on the same judgment, and levied it upon other goods with a view to double-charge the debtor. In our practice no such thing could happen, unless through the default of the clerk, for the party is never entitled to two executions of the same or different grades, at the same time, but both are the constant practice in the courts of Great Britain; and this is the true reason case was held to be the proper remedy.

- The judgment of the county court is affirmed.

OFFICER IS JUSTIFIED FOR HIS ACTIONS within the scope of the command of a process appearing on its face to have regularly issued: *Watson v. Watson*, 23 Am. Dec. 324. See note to *Savacool v. Boughton*, 21 Id. 181.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

NAYLOR v. THROCKMORTON ET AL.

[7 LEIGH, 28.]

WHERE SEVERAL MORTGAGES OF THE SAME LAND are executed on the same day, one immediately following the other, to secure several debts due the several mortgagees, and are all proved and delivered to the clerk for recordation on the same day, but in the order in which they were executed, and there is no express agreement that any one should have priority over the other, or that they should all stand on the same footing, the one first executed is entitled to priority over the others.

BILL exhibited in the superior court of chancery of Winchester, by Naylor, as trustee, against Throckmorton and Gamble, as trustees, and certain creditors of one Machir. The latter, being indebted to different persons, executed three deeds of trust, by which he mortgaged a parcel of land in Hampshire to secure the payment of such indebtedness. The first deed conveyed the land in trust to Throckmorton and Gamble, for the security for two debts due to Inskeep and Pierce; the second conveyed it to Naylor, to secure a debt due to the executor of one Rennick; and the third to Naylor and Gamble, to secure a debt due to the administrator of one Welton. The deeds were all executed on the same day, one immediately following the other in the order above mentioned, and were so delivered to the clerk for recordation. There was no evidence offered of any agreement that any one of said mortgages was to be preferred to the other, nor that they were to stand on the same footing. By order of the chancery court the land was sold, and the proceeds, being insufficient to pay all the debts, were directed to be applied to the payment of the debts due Inskeep and Pierce,

and then to the debts due Bennick's executor, and finally to the payment of the debt due to Welton's administrator. From this decree Naylor appealed.

Robinson, for the appellant.

Johnson, for the appellees.

CARE, J. (after stating the circumstances of the case, and quoting the words of the statute). The case seems to me to lie in very narrow compass. There is no doubt in point of fact, that the deed for the benefit of Inskeep and Pierce was first executed. But it is contended that the transaction being one, all the deeds executed, one after another, as nearly as possible at the same time, the parties present and witnessing each other's deeds; we must conclude, that the understanding was that the money arising from the land should be shared equally among them, in proportion to their debts. It is certain, there was no such agreement made, nor any such understanding expressed by any of the parties; nor was there any concealment or shadow of fraud; all was done openly. It is certain, too, that it was the opinion of all parties, that the land would sell for more than would pay all the debts; and hence it would be deemed of little moment who was first paid, and probably none of them thought about it. It is clear to me, that the deed to Inskeep and Pierce has the legal preference; and I can not perceive any ground, on which equity can take this legal advantage from them. I think the decree must be affirmed.

The other judges concurred. Decree affirmed

Absent, TUCKER, P.

WILKINSON v. JETT.

[7 LEACH, 115.]

ADMISSION OF INCOMPETENT EVIDENCE, by consent, for the defendant, does not justify the admission of other incompetent evidence for the plaintiff to which the defendant objects.

WHERE, IN ASSUMPSIT by J., a sub-contractor, against W., a contractor for carrying the United States mail, to recover J.'s proportion of the compensation received for the services rendered, a letter of the postmaster-general is read in evidence by the defendant, without objection, to prove defaults committed by the plaintiff in the execution of that part of the contract which was underlet to him, a certificate of the postmaster-general, showing the times and places of the defaults in the contract, is inadmissible on plaintiff's behalf against defendant's objection.

AN AGREEMENT BY A CONTRACTOR for carrying the mail with a sub-contractor, that he shall perform one half the service, and be entitled to one half the compensation, does not constitute a partnership between such parties. *Per BROOKS, J.*

ASSUMPSIT brought by Jett against Wilkinson. The declaration set forth that Wilkinson was a contractor with the postmaster-general of the United States for carrying the mail over certain routes, and that he agreed to pay him, the plaintiff, one half the amount he should receive for such services, if plaintiff would carry the mails one half the time, which plaintiff did. That defendant had received on account of such contracts two thousand four hundred and thirty-eight dollars, but had refused and failed to pay plaintiff one half thereof. Plea, the general issue. At the trial two points were preserved by bills of exceptions filed. Plaintiff having proved the agreement with defendant as stated in his declaration, the defendant requested the court to instruct the jury that the agreement constituted a partnership between the parties, and that no action at law could be maintained by one partner against the other. The court refused to so instruct the jury, and instructed them that the agreement did not constitute a partnership, and defendant excepted. The defendant, to prove negligence and misconduct on plaintiff's part in performing his contract, offered in evidence a letter from the postmaster-general. And thereupon the plaintiff, to show that such negligence and misconduct arose from the defendant's own defaults in carrying the mail at the time he was bound to carry the same, offered in evidence a certificate of the postmaster-general setting forth the irregularities and the time and place they occurred. Defendant objected to the admission of such certificate, which was overruled, and the exception to such ruling constituted the second bill of exceptions. Verdict and judgment for the plaintiff.

Johnson, for the appellant.

Taylor, for the appellee.

By Court. The circuit court erred in admitting the certificate of the postmaster-general, mentioned in the second exception, as evidence on the trial. The letter of that officer, mentioned in the same exception, was inadmissible as evidence for the defendant, except by the plaintiff's consent: but his having consented that the letter should be read in evidence for the defendant, was no sufficient reason for admitting the certificate as evidence for the plaintiff, without the defendant's consent, since it was not legal evidence. Therefore judgment reversed, and cause sent back for a new trial.

BROOKE, J., agreed, that the judgment should be reversed, but on a different ground. He said, as to the first exception,

the circuit court was right in deciding, that the agreements did not constitute a partnership between plaintiff and defendant. In the second exception, I think the evidence is too imperfectly stated. It is stated, that the defendant introduced a letter from the postmaster-general, and other evidence, to prove defaults in the plaintiff; but neither the letter, nor its purport, is set out, nor what was the other evidence to prove the misconduct of the plaintiff. And as the letter was not objected to by the plaintiff, I am not sure that the certificate of the postmaster-general, introduced for the plaintiff, was not admissible to explain the letter introduced by the defendant. At least, after the defendant had introduced the letter, which was improper evidence, I am not satisfied, that it lay in his mouth to object to the certificate to explain it. I think the cause should be sent back for uncertainty in the second bill of exceptions

Judgment reversed.

Absent, CABELL, J.

PARTNERSHIP.—General reputation is not sufficient to charge a particular person as partner; there must be some admission of his, or some overt act to prove it: *Hunt v. Jucks*, 1 Am. Dec. 555. It must appear either that he has permitted the use of his name as one of the firm to give it credit, or that he has shared in the profits or losses: *Osborne v. Brennan*, 10 Id. 614. See, as to who are partners, *Miller v. Hughes*, Id. 719; *Spears v. Toland*, Id. 722.

PROOF OF AN ACTUAL COMMUNITY OF INTEREST accompanied by an agreement to participate in the profits and contribute to the losses of the concern establishes a partnership: *Brown's Ex'r v. Higginbotham*, 27 Am. Dec. 618.

RIDER v. NELSON AND ALBEMARLE UNION FACTORY.

[7 LEIGH, 154.]

WHERE, DURING THE PENDENCY of an appeal from a decree dismissing a bill against a corporation, the charter of the company expires by the lapse of time, the appeal abates.

BILL filed by Rider against the Nelson and Albemarle Union factory in the court of chancery of Lynchburg, which was dismissed as not presenting a proper case for relief in equity. From this decree Rider appealed. Defendant was a public corporation incorporated by an act of the assembly for a limited time. During the pendency of the appeal the charter expired.

Johnson, as *amicus curiæ*, moved that the appeal should be entered as abated, because the defendant's charter had expired.

TUCKER, P. Nothing can be more obvious than the impossi-

bility of proceeding with a suit, however well brought, where there are no parties before the court, or where one of them is no more, and has not, and can not have, any person to represent him. If this be the case where the charter of a corporation has expired or been dissolved, it must follow that the appeal, and the suit itself, must abate. Now, it seems undeniable, that there is no person at this time capable of representing the Union factory. Where a corporation is sued, the president and directors are brought before the court to represent it, for as it is a body only in contemplation of law, there is no other way in which it can be sued. But when its charter expires, it ceases to have a president and directors. Their powers wither with the termination of the existence of the body of which they are but members. Nor can a new president and new directors ever be elected, as the corporation itself is extinct. Thus, then, the company neither has, nor can have, any representative in court, to assert or protect its interests, if indeed it continued to have any. But this it can not have according to law. For it is beyond question, that its power to hold property in the character of a corporation, is gone at the instant of the termination of its existence. Whether its property reverts to the donors, or to the stockholders, or to the commonwealth as derelict there seems to be no doubt, that it no longer remains in the corporation as such. Without express legislative enactment, this imaginary creature of the law never could have held property at all. It can, therefore, only hold it so far as it is given, and for so long a time as it is permitted by the charter which gave it existence. But the charter authorizes it to hold property, and to sue and be sued, for twenty years and no longer. After that time, therefore, it can hold no property. And this furnishes an additional and conclusive reason for the abatement of suits for it or against it. For, if no longer entitled to hold property, no judgment for money or other thing should be given in its favor, and if it has no property, every judgment against it must be fruitless and futile.

Therefore, without going into the perplexing inquiries which suggest themselves naturally to the mind, as to the effect of the dissolution of a corporation upon its effects and its contracts, we feel ourselves warranted in saying, that where the charter of a corporation expires during the pendency of a suit, the suit must abate, whether the company be plaintiff or defendant. Accordingly, in this case the suit must be abated and the abatement certified to the court of chancery. It may be proper to add, that it appears to us to be peculiarly desirable, in a country

where numerous companies are annually incorporated for a limited number of years, that the legislature should provide in detail, what shall be the effect of the expiration or other determination of their charters, instead of leaving that matter to the embarrassment and the obscurity of common law principles. According to them, the debts of a corporation either to it or from it are extinguished by its dissolution; nor are the members liable, in their individual characters, for any portion of the debts of the corporation: 1 Lev. 237. The lands of the corporation revert to the donors: 1 Bl. Com. 484. The personality, it is supposed, goes to the commonwealth. If these things be so (and there is no reasonable doubt about it), they are grossly unjust. It can not be just, that the members of a joint stock company should forfeit their property to the commonwealth by the expiration of their charter. It can not be just, that the land which they have purchased and paid for, should revert to the grantor who has already received value for it. It can not be just, that those who are indebted to the corporation (a bank for instance) should be absolved from their engagements; and still less, that by a forfeiture of its charter, those to whom it is indebted should lose their just demands. To avoid all those consequences, the first bank of the United States transferred its funds and property, before its dissolution, to trustees for the benefit of the stockholders. But, it is believed, that the necessity of some such *succedaneum* is not very generally adverted to, and would therefore be wisely avoided by some general legislative provision on the subject. In the mean time, we must proceed upon common law principles, and in doing so, we must direct this appeal to be abated.

DISSOLUTION OF CORPORATION: See generally as to the effect of, the notes to *State Bank v. State*, 12 Am. Dec. 239; and *Briggs v. Penniman*, 18 Id. 461. A dissolution does not result from omitting to continue the succession to certain officers, when these offices are in fact exercised by officers *de facto*: *Lehigh B. Co. v. Lehigh C. & N. Co.*, 26 Id. 111. Neither does the loss of an integral part of a corporate body effect a total dissolution unless there is a permanent incapacity to restore the lost part. It may suspend, however, the corporate franchise: *Id.* A surrender of its corporate rights, and suffering acts to be done which destroy the end and object for which it was instituted, may work a dissolution: *Slee v. Bloom*, 10 Id. 273; *Briggs v. Penniman*, 18 Id. 454. Such misuser or non-user can not be taken advantage of collaterally, but, whether there has been a forfeiture resulting therefrom, must be determined judicially in a direct proceeding for that purpose: *Trustees v. Hills*, 16 Id. 429; *John v. F. & M. Bank*, 20 Id. 119. Whether a dissolution has taken place is a matter of law arising from facts: *John v. F. & M. Bank*, *supra*.

SMITH v. JONES.

[7 LEIGH, 165.]

AN AUCTIONEER is the agent of the purchaser as well as of the vendor.

A MEMORANDUM in writing signed by such auctioneer or by his clerk, stating the terms of sales, is a sufficient compliance with the statute of frauds.

SUCH MEMORANDUM may be specifically enforced at the instance of the vendor, although it does not state the credit on which the land was sold.

BILL filed by Jones against Smith for the specific enforcement of an agreement in writing, for the sale of a tract of land. The sale was made by Knox, the agent of Jones, at public auction. The land was cried out to Smith, he being the highest bidder, and the following account of sales was kept by the auctioneer: "Account sales made by W. Knox, agent for W. Jones, at Madison, commencing, etc. T. Ball, clerk." And a memorandum of the sale of the land was made in that account by the auctioneer's clerk at the time of the sale, as follows: "Fox tract of land four dollars and ten cents per acre; purchaser, W. Smith." The answer pleaded the statute of frauds. The other facts appear from the opinions. A specific execution was decreed.

Robinson, for the appellant.

Johnson, for the appellee.

BROOKENBROUGH, J. The first question discussed in this case, was much investigated at the bar and by this court, in *Brent v. Green*. The court adopted the decisions in *Emmerson v. Heelis*, 2 Taunt. 46, and *White v. Proctor*, 4 Id. 211, as settling the law, that in sales at public auctions, the auctioneer was to be considered as the lawfully authorized agent of the purchaser as well as of the vendor, and that a note or memorandum in writing of the agreement between the vendor and vendee, signed by such agent, was a sufficient signing within the statute of frauds, and was binding on both parties. The objection that the memorandum in this case was signed, not by the auctioneer but by the clerk, ought not, I think, to prevail. He was the clerk of the auctioneer—his amanuensis—and wrote the memorandum on the account of sales by his direction and under his superintendence. In all extensive auction sales, a clerk is indispensably necessary, and the employment of one is safest for both vendor and vendee. Great inconvenience would be experienced, and much mischief done, if we were to decide, that a memorandum signed by the auctioneer's clerk, was not as complete a compli-

ance with the statute, as the signature by the auctioneer himself.

The remaining question is, whether the memorandum of the sale, made as it was by the lawfully authorized agent of the purchaser, be a sufficient memorandum or note of the contract for the sale of the land in the bill mentioned, to charge the defendant, and to entitle the plaintiff to a specific execution of the contract. The cases of *Hinde v. Whitehouse*,¹ and *Kenworthy v. Schofield*,² were relied on to show, that when such memorandum is made, the terms or conditions of the sale should either be embraced therein, or that the written or printed paper which contains the conditions of sale, should be annexed to the paper on which the memorandum is made, and before it is made, or be referred to by it. I admit that those cases are very strong to that effect; yet I do not think they should govern this case. I am of opinion, that the memorandum before us does contain the terms or conditions of the sale. Take the memorandum by itself, without referring to the parol evidence, and every one would understand, that Smith did purchase the Fox tract of land, for four dollars and ten cents per acre, payable in ready money. The terms of the sale, then, are expressed in the writing. The defendant bound himself to pay in cash. If it is alleged, that the memorandum does not contain the true terms, I admit it. But the mistake or falsehood in the memorandum does not invalidate the contract under the statute of frauds and perjuries. The statute is complied with. If the vendor had claimed a specific performance of this contract for cash, equity would have relieved the vendee, not because the statute was not complied with, but because of the mistake as to the terms, or the fraud of the vendor in stating false terms; and it would allow the vendee to give parol evidence of that mistake or falsehood. There is, however, no necessity for such relief here, because the vendor has in his bill honestly stated the true terms, and they are more favorable to the vendee than those contained in the memorandum. He can not complain of the mistake, as it is rectified by the plaintiff in his bill, and there is no ground to charge the plaintiff with fraud. I think the decree should be affirmed.

CARR, J. Two questions were raised and well discussed, in this case: 1. Was there a signing within the statute of frauds? 2. Was the contract so certain in its terms as to authorize a specific execution? Upon the first question we were referred

to the case of *Brent v. Green*,¹ where a deputy sheriff, acting for the high sheriff, under our insolvent law, sold at auction the interest of an insolvent debtor in a tract of land contained in his schedule and when the land was knocked down to the purchaser, he wrote on the schedule the price of the land, and the purchaser's name: and we decided, on a full discussion, and reference to all the authorities, that this was a sufficient signing of a memorandum in writing under the statute, to bind the purchaser. That case is exactly in point to this, as to the signing; for here, there was a sale at public auction, of many such articles of property as are for sale when a farm is broken up, and the land itself was also sold. The sales were conducted by Knox, the agent of Jones. A regular account of sales was kept by the clerk, who set down the sale of the land, the price, and the name of the purchaser. Here, then, is the name of the purchaser set to a memorandum in writing, stating that he had bought the Fox tract of land at four dollars and ten cents per acre; and his name thus signed by the auctioneer.

I shall not go over again here, the numerous cases which settle the question that the auctioneer is an agent for the vendee authorized to sign his name; but I will just repeat what is so briefly and strongly said by Mansfield, C. J., in *Emmerson v. Heelis*, 2 Taunt. 46. "By what authority does he (the auctioneer) write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore, he writes the name by authority of the purchaser, and he is an agent for the purchaser; and it does seem, therefore, that this is a contract, signed by an agent for the purchaser, and consequently binding." It was objected, that the name was not written by the hand of the agent but of his clerk. The cases consider this as making no difference, the clerk acting immediately under the eye of his principal. In *White v. Proctor*,² Mansfield, C. J., answers an objection of this kind thus: "If an agent has cut his finger so that he can not write, and says to another, 'write down my name,' will not that signature bind the principal?"

The second question is, whether the memorandum has sufficient certainty to authorize its specific execution. The two cases above cited say, that entering the name of the buyer in the auctioneer's book, is just the same thing as if the buyer had

1. 6 Leigh, 16.

2. 4 Taunt. 211.

written his own name. Suppose, then, we throw this agreement into the form it would have assumed, if written by Smith himself: "Memorandum, that I, J. Smith, have bought of W. Knox, agent for W. Jones, the Fox tract of land, at four dollars and ten cents per acre. (Signed) J. Smith." It will be seen, that there is not a single term here, which is not stated in the heading of the account of sales, and the entry of the sale of the land. Now, to my mind, this presents an agreement sufficiently certain for specific execution. The thing bought and sold, the terms of sale, and the buyer, are distinctly set forth. It is objected, that we are not told whether it is a sale for cash or credit. I question much, whether this objection would have occurred, even to the acute mind of the counsel, if the bill had not stated that the terms in the advertisement were twelve months' credit. But this statement is not supported; we see nothing of the advertisement; it is in no way made part of the case. Whether to supply it by parol proof would have been permitted, is a question which does not arise, as no such attempt was made. Taking the memorandum on its face, it presents no such uncertainty. There being no time limited either for paying the price or executing the deed, the conclusion is, that either party may presently insist on carrying the contract into execution. The vendee might tender his money and demand a deed, or the vendor tender his deed and demand the money, without delay. It will be remembered, that this is not an objection that the *allegata* and *probata* do not agree; that the plaintiff has not properly described the agreement; but that the agreement itself, as it actually exists, is not sufficiently certain to take the case out of the statute of frauds. If we look at the many English cases which have been decided on this point, I think we shall find few with more certainty, many with less, that have been supported by the courts: in my opinion, *Emmerson v. Heelis* and *White v. Proctor* have not more. If we look into our own cases, we find several with less certainty than this, specifically executed. I shall only refer to *Johnson v. Ronald's Adm'r*.¹

CABELL and BROOKE, JJ., concurred. Decree affirmed.

Absent, TUCKER, P.

STATUTE OF FRAUDS—MEMORANDUM BY AUCTIONEER.—An auctioneer in making sales of property acts as the agent of the purchaser as well as of the

owner of the property, and an entry by him in the auction book of the name of the bidder, and the amount bid, is a sufficient memorandum to take the sale out of the statute of frauds: *Singstack v. Harding*, 7 Am. Dec. 669; *Davis v. Robertson*, 12 Id. 611; *Meadows v. Meadows*, 15 Id. 645.

MEMORANDUM OF SALE AT AUCTION.—As to the terms of such memorandum, the time when it must be signed, and by whom, see the note to *Davis v. Rowell*, 13 Am. Dec. 398.

NOTE OR MEMORANDUM OF A CONTRACT, required by the statute of frauds, need not give all its details, but must express its substance with reasonable certainty, either directly, or by reference to some other instrument, record, or other matter, by which such certainty is attainable: *Atwood v. Cobb*, 26 Am. Dec. 657.

CERTAINTY IN CONTRACT REQUISITE FOR SPECIFIC PERFORMANCE.—This subject is considered at length in the note to *Atwood v. Cobb*, 26 Am. Dec. 661.

TURNER v. DAVIS ET AL.

[7 LEIGH, 227.]

JUDGMENT AT LAW—RELIEF AGAINST IN EQUITY.—Where, in a proceeding by one person against another to recover money which he alleged he paid as the surety for the latter, it was determined that both were principals, and judgment was rendered in favor of the plaintiff for a moiety of the sum paid, the defendant, having made no defense, can not come into equity and obtain any relief, although he shows that he was the surety, and the plaintiff in the action at law the principal, unless he alleges and proves sufficient reasons for his failure to defend at law.

BILL filed by Davis and Ferguson against Turner and his assignees for relief against a judgment at law recovered by the latter against Ferguson. Davis held the bond of one Johnson, in which Turner was partly interested, and which was sold by them to Nicholls, both joining in the assignment, but the consideration therefor was paid to Turner. An action brought upon the bond was defeated, the obligor, Johnson, showing it to have been founded on a gaming consideration. Nicholls thereupon brought an action against Davis and Turner upon their assignment, and recovered judgment, which the latter paid, and then moved for judgment against Davis for the money so paid, claiming to be the latter's surety, and after several continuances, the court, considering Davis and Turner jointly liable, gave the latter judgment for one half the sum paid. Upon this judgment Davis was taken in custody upon a *ca. sa.*, and Ferguson, to obtain his release, executed his bond to Turner, which was assigned by him to the other defendants in the present action, who brought suit on it and recovered judgment.

The bill set forth the above facts, and also showed that Turner had received the whole consideration paid by Nicholls for the assignment of Johnson's bond. It was also alleged that the judgment recovered by Turner against Davis was in consequence of the absence of Nicholls from the state, by whom it could have been proved that Turner received the whole consideration for the assignment of the Johnson bond. The answer of Turner denied all the material allegations of the bill, and that of the assignees denied all notice of plaintiff's equities. All the allegations of the bill were proved, except that it did not appear that Nicholls was absent from the state at the time Turner recovered his judgment against Davis. Upon the trial the temporary injunction granted was perpetuated, and a decree entered by which Turner was made responsible to his assignees for the judgment recovered against Ferguson. Turner appealed.

Johnson, for the appellant.

No counsel *contra*.

TUCKER, P. It is the settled rule of this court, that where a party has been grossly inattentive and negligent of his defense at law, he shall have no relief in equity. Here it appears, that Turner's motion against Davis was first continued at the defendant's costs; so that he appeared to defend himself upon the motion; and it was continued, from month to month, for several successive terms afterwards. At length judgment was rendered against him, because, as "he supposed," Nicholls was not present to testify. If he had cause for continuance for Nicholls' testimony, he ought to have applied for a continuance, and if it was refused, taken an exception. This he did not do; and then he comes into equity, alleging Nicholls' absence from the country at the time of the trial; but he does not prove it, though Nicholls himself was examined. It is impossible, without an entire overthrow of established rules, to sustain the bill in such a case. This I should much regret, as there seems every reason to suppose that Turner received the whole money from Nicholls, but that it is manifest to me that while Davis held out the threat of contesting Turner's right of recovery, he was willing enough to avail himself of the arrangement made by Ferguson, by quitting the close custody in which he was. If he can be considered as assenting to the arrangement, then the case is one of compromise and adjustment of a subsisting dispute, and so ought to terminate the contest. If he did not assent, then Ferguson has intervened of his own ac-

cord, and has, for the consideration of his bond, obtained the discharge of Turner's debtor, with full knowledge of the debtor's denial of the debt. In this aspect of the case, he must be held responsible, whether he can have recourse to Davis or not. His responsibility is independent of Davis'. The consideration of his bond is the release of Davis from custody, not the debt due from Davis; and, accordingly, we find he gave the assurance at the time that he would pay whether Davis did or not.

The other judges concurred.

Decree reversed, and bill dismissed.

Absent, CABELL, J.

RELIEF IN EQUITY AGAINST JUDGMENT AT LAW.—As to the power of equity to relieve against a judgment at law, and the grounds upon which such relief is granted, see the note to *Oliver v. Pray*, 19 Am. Dec. 603. See also *McClure v. Miller*, 21 Id. 522; *Armstrong v. Cheshire*, 24 Id. 273; and *Haughy v. Strang*, 27 Id. 648.

CHAPLINE v. OVERSEERS OF THE POOR, ETC.

[7 LEIGH, 231.]

OVERSEERS OF THE POOR ARE A CORPORATE BODY who may sue and be sued; they may maintain a motion against a predecessor in office for moneys officially received by him and unaccounted for; and they may submit such claim to arbitration.

WHERE, PENDING SUCH A MOTION, THE PLAINTIFFS' TERM OF OFFICE EXPIRES, their motion does not abate, but they may proceed and prosecute it, being themselves accountable to their successors for the money recovered.

WHERE A MATTER OF LAW IS REFERRED to arbitration, the parties must abide by the decision of referees, although erroneous.

MOTION made in the county court for Ohio county, by the overseers of the poor for the year 1827, against Chapline, who had been such overseer for the years 1823, 1824, and 1825, for moneys officially received by him and unaccounted for. Chapline produced in defense his accounts, which had been settled by commissioners appointed by the county court, and claimed that they were conclusive as to the amount he should account for, and also insisted that they were not entitled to recover, because it did not appear that they were duly elected and appointed overseers of the poor. The objection was sustained and the motion dismissed. On appeal to the circuit court, the judgment of dismissal was reversed and the cause remanded

for further proceedings. On the second hearing, defendant objected that there had been no appropriation of the moneys in his hands to the plaintiff, and that they could not, for that reason, maintain their motion. This objection was overruled, and the matters in dispute were submitted to arbitration, and an award was made against defendant for one thousand and twenty-six dollars. Judgment was demanded upon the award, which was opposed by defendant, because the plaintiffs were not then overseers of the poor, their term of office having expired, and their successors having been regularly elected and appointed, and he moved that the plaintiffs' motion abate. This objection and motion were both overruled and judgment entered on the award. On appeal to the circuit court this judgment was affirmed, and Chapline appealed to this court.

Campbell, for the appellant.

Johnson, for the appellees.

By Court, TUCKER, P. The first point to be established in this case is, the character of the overseers of the poor. By the act of May, 1780, c. 22; 10 Hen. Stat. at Large, 288, 289, the overseers of the poor were commanded to be elected, and were declared to be a body politic and corporate, to sue and be sued, and were invested with the powers and duties of former churchwardens and vestries. This character they still retain. Next if we advert to the law as to churchwardens, we find that they are a *quasi* corporation, with power to sue and be sued: 1 Bl. Com. 394; and that succeeding churchwardens may bring an action of account against their predecessors at common law: 1 Bac. Abr., Churchwardens, E, 604. Moreover, though churchwardens can not commence a suit in their own names after their year is out, yet if a suit was begun within their year, they might proceed with it after their year was out, "it being *ex necessitate* to prevent people from delays in order to wear out the year:" *Dent v. Prudence*, 2 Str. 852. Thus an answer is at once afforded to most of the questions in this case. The overseers of the poor can sue their predecessors; and the statute gives them the summary remedy by motion. The proceeding does not abate by the expiration of their office, but may go on in their names to a recovery, for the amount of which they in turn will be accountable to their successors. Being a corporation capable to sue, they moreover have power to submit to arbitration; for it is a general principle, that whoever can contract can submit; and, indeed, in general, whoever can

sue is entitled to submit, except those who can not contract. As to the errors in judgment of the arbitrators, I perceive none upon the face of the award; and even if there were any, it is well established, that where a matter of law is referred, the parties must abide by the decision though erroneous: *Smith v. Smith*, 4 Rand. 95; 6 Ves. 282;¹ 9 Id. 364.² And as to the facts, the court by the reference is divested of all judgment as to them: *Per* Lord Commissioner Eyre in *Dick v. Milligan*, 2 Ves. jun. 24.

Judgment affirmed.

Absent, CABELL, J.

AWARD.—The grounds upon which an award may be impeached and set aside, are stated and considered at length, in the note to *Jocelyn v. Donnel*, 14 Am. Dec. 754. Where a mistake of law or fact is apparent upon the face of the award, it will be a good ground for setting it aside: *Id.* See *Henitt v. State*, 14 Id. 259; *McCalmont v. Whitaker*, 23 Id. 102; *Bumpass v. Webb*, 29 Id. 274, 277, note.

CROMWELL v. TATE'S EX'R.

[7 LEECH, 301.]

WHERE A WRITTEN CONTRACT HAS A SCROLL annexed thereto, opposite the signature, and the word seal is written in the scroll, but in the body of the instrument there is no recognition of the scroll as a seal, it is a simple contract and not a deed.

DEBT in the circuit court of Jefferson, by Tate's executor, against Cromwell, upon an instrument in writing, alleged in the declaration to be due by bond sealed with Cromwell's seal. Plea, payment. Profert was made of the bond, which was as follows: "On demand, I obligate myself, my heirs, etc., to pay unto W. Tate, guardian of J. Strother, one hundred and one dollars, with interest from the first December, 1808. Assumpsit for Pendleton. Stephen Cromwell. Seal." At the trial, this instrument was offered in evidence by plaintiff, and received by the court, against defendant's objection that the instrument in the declaration was declared on as deed sealed by the defendant, and the paper offered in evidence did not appear from anything in the body thereof to be a sealed instrument, or so intended to be. The word "seal" was written in the scroll after Cromwell's signature. Verdict and judgment for plaintiff. Defendant appealed.

1. *Ching v. Ching*.

2. *Young v. Waller*.

Faulkner, for the appellant.

Johnson, *contra*.

TUCKER, P. In this case, the question is distinctly presented, whether a scroll must be recognized as a seal in the body of the instrument in order to constitute it a deed. At common law, and in early times, I have little doubt that a seal meant an impression made on wax, or other thing which would receive and retain an impression; for seals were introduced by the Normans, it is said, and used in fact as a signature, at a time when each man had his signet, and a certain coat of arms or engraving upon it designated the individual: 3 Bac. Abr. 164. Lord Coke says, a seal is wax with an impression. When this was the case, the question of seal or no seal, deed or no deed, was matter to be decided by inspection. And, accordingly, he who declared upon a deed made profert of it, that the court might see that it was a good deed; and, in like manner, he who pleaded a deed made profert of it in his plea, with the same view: 5 Bac. Abr. 432; 6 Co. 36; 10 Id. 92 b. The inspection was sufficient to establish whether the instrument was a deed; but even when that appeared, the question next presented was, whether it was or was not the deed of the party sought to be charged. If not, he denied it by the plea of *non est factum*, and that plea was tried of necessity upon proofs *dehors* the deed. In process of time, other materials than wax were used; but the impression seems still to have been considered as important, and its existence was still to be tried by inspection. But, at length, among us at least, a scroll seems to have been habitually used as a seal, even anterior to our statute on the subject, and was accordingly recognized as such in the cases of *Jones v. Logwood*, 1 Wash. 42, and *Baird v. Blaignrove*, Id. 170. Still, however, the question of seal or no seal, deed or no deed, was properly to be tried by the court upon inspection. If the defendant denied that the instrument declared on was a deed, he might crave oyer and demur; and then the question was directly submitted to the court. If the plaintiff declares upon a deed, and upon the trial, the defendant objects for variance that the paper produced is no deed, the court decides the question by inspection. The existence or non-existence of the seal is to be ascertained by an appeal to the senses; and where that is the case, the judges of the court shall, upon the testimony of their own senses, decide the point in dispute: 3 Bl. Com. 331; 6 Bac. Abr. 631. Hence we find Mr. Marshall, in the case of

Baird v. Blaignrove,¹ asserting that the fact of the instrument being sealed was to be decided by the court. In this, I think he was clearly right, although, upon the plea of *non est factum*, the fact of seal or no seal might also be tried by the jury.

Whether the instrument however was sealed or not, did not, at common law, it seems, depend at all upon the recognition of the seal in the body of the deed. For the clause in *cujus rei testimonium*, including the allegation that the instrument was sealed by the parties, was not at common law deemed essential to the validity of the deed, or the proof of the sealing: 3 Bac. Abr. 163; Shep. Touch. 55; 2 Co. 5 a. The existence of the seal was proved by itself, and whether it was the seal of the party or not, was to be established by witnesses, and tried by the jury on the plea of *non est factum*. Indeed, when the deed was not signed, as was common in early times, the clause of recognition could be of no importance, since the fact of sealing was necessary to be proved, in order first to establish the recognition, and when the fact of sealing was once proved, the recognition was no longer of any importance. Proceeding then upon common law principles, and untrammelled by former decisions of our courts, I should say, that an instrument to which a scroll was affixed, was a deed, whether the scroll was recognized as a seal in the body of the instrument or not; and that the defendant must plead *non est factum* if he denies the scroll to be his. To the same conclusion I should come in construing our statute, since it must be considered as having been enacted in reference to common law doctrines. But the decisions of our courts have been too frequent the other way, to justify a departure from them now. In *Baird v. Blaignrove*, more than forty-two years ago, the recognition of the scroll as a seal in the body of the instrument, seems to have been considered as necessary. This too appears to me to be the case in *Austin v. Whillock*,² *Anderson v. Bullock*,³ and *Peasley v. Boatwright*.⁴ And the same opinion, I understand, was held by this court in the case of *Turberville v. Bernard*.⁵

The impression that such is now the law, is very general. To reverse the course of the court, and to declare those instruments to be deeds which have a scroll affixed without recognition in the body of the instrument, would be very mischievous. It might give rise to many writs of error, affect the decision of many suits now depending and prosecuted upon the faith of

1. 1 Wash. 170.

3. 4 Munf. 442.

2. 1 Munf. 487; S. C., 4 Am. Dec. 530.

4. 2 Leigh, 195.

5. 7 Leigh, 302, note.

former adjudications, and might moreover produce *devastavit* in the case of executors, who have treated as simple contracts, instruments that fall within that description according to the principles of the cases heretofore decided. I can not therefore consent to overrule them, nor do I think it desirable to restore the common law doctrine. The omission of the clause in *cujus rei testimonium* admits, I think, of gross abuses. They are alluded to by Judge Tucker in his opinion in the case of *Austin v. Whillock*. The facility with which a seal of wax or a scroll may be fraudulently affixed to the name of the party, and the character of the instrument thereby entirely changed, affords an unanswerable argument in favor of requiring the recognition of the seal in the body of the instrument. As the addition of the seal may create a lien on the realty; as it operates an estoppel, and concludes the party from denying the consideration or questioning the facts set forth in the instrument; as it elevates the contract to the dignity of a specialty in the distribution of assets; as it excludes the protection of the act of limitations; as it is so easy to add a seal fraudulently, without risk of detection; and as the proof of handwriting, in the absence of subscribing witnesses, is considered sufficient proof of sealing and delivery, I think it wise to require a recognition of the seal by the instrument itself, instead of trusting the proof of so important a fact to the slippery memory of witnesses. Constituting, as the fact of sealing does, a part of the very contract itself, creating by its annexation to the signature, stipulations and terms which, without it, would not arise out of its language, there is every motive for requiring that the recognition of it should be found in that writing, which contains all the other terms and stipulations between the parties to the contract. Thus, it is conceded that heirs are not bound, unless named in the instrument; and even though named, they are not bound unless there be a seal. If, then, the obligation upon them must be set forth in the written stipulations of the instrument itself, it would seem to follow that everything which is an essential to the completion of that obligation must be there set forth; and as sealing is an essential, the sealing should be set forth, or recognized in the body of the instrument. It is, indeed, contrary to the analogies and principles of the law, that an essential term or stipulation of a written contract should be made to depend wholly upon testimony *dehors* the instrument.

Upon the whole, therefore, I think it is no subject of regret, that the rule of recognition has been established. I shall only

add that I do not think the word seal, written in the scroll, amounts to the required recognition. The recognition, if required at all, ought to be express, and not left to vague inference; for otherwise no man could be certain as to the nature and character of the contract he holds, and no counsel could be certain in what manner it should be treated when he brings suit upon it.

The other judges concurred. Judgment reversed.
Absent, CABELL, J.

HARRIS v. CARSON.

[7 LEIGH, 682.]

WHERE LAND IS LEASED for a certain and determinate period, the tenant is not entitled to the crop on the land at the end of the term.

PAROL EVIDENCE IS INADMISSIBLE to explain a written contract of lease for a fixed and certain period by showing a usage that an outgoing tenant is entitled to the crop on the land at the determination of the lease.

ANY PRACTICE OR USAGE, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom; because it lacks the essential ingredient of a good custom, it is not immemorial.

TRESPASS brought by James Harris against Elijah Carson in the county court of Augusta. Judgment for plaintiff, which was set aside by the circuit court and a new trial granted. From the judgment of the circuit court a *supersedeas* was allowed by the court of appeals on petition of Harris. The facts are stated in the opinion.

B. G. Baldwin, for the plaintiff in error.

Peyton, for the defendant in error.

CABELL, J. Harris, the plaintiff in error, leased from Purris a tenement in the county of Augusta, for the term of four years, commencing on the first of April, 1825, and ending on the first of April, 1829. There is nothing in the lease purporting to give to the tenant any interest in the land, or in the crops upon it, after the termination of the lease. On the day on which this lease terminated, the same tenement was leased by Purris to Carson, the defendant in error, who in the summer of 1829 proceeded to cut and carry away a part of the crop of small grain which had been sown the fall before, by the former tenant. The main question presented by the record is, whether the off-going or the incoming tenant was entitled to this crop. The lease

in this case having a fixed and certain period for its termination, it is clear, beyond doubt, that the offgoing tenant had no right, at the common law, to any crops growing on the land, after the termination of the lease, although they may have been sown during his possession of and interest in the land; for it was his own folly to sow, when he knew that his interest would expire before he could reap. The crops are claimed, however, in this case, on the ground of a custom said to prevail in the district of country in which the land lies, that the offgoing tenant shall have the way-going crops. The case of *Wigglesworth v. Dallison*, Doug. 201, was strongly relied upon by the counsel for the plaintiff in error, as showing that a custom would, in England, entitle the offgoing tenant to the way-going crop, even where, as in this case, the lease was by writing under seal, and to end at a fixed time. But the ground on which Lord Mansfield himself placed that decision, shows that it can have no weight in this country. He says: "The custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking." I entirely concur in the correctness of this opinion as applied to a case in England. But it is correct, not on the ground of direct contract, nor because the parties are presumed to have contracted in reference to the custom: it is correct, because of the force of the custom, as such; for, in England, where they have particular customs, the custom of the county in which the land lies is as much the law of that county as the common law is the law of the other parts of the country where they have no such particular custom. The particular custom prevents the application of the common law to the county or district in which the custom prevails, by showing that the common law, as to this subject, never had any existence in that county or district. For, a custom, to be valid, must be as old as the common law; it must be immemorial. And if the particular custom be proved to be immemorial, it necessarily excludes the general custom, or common law; for two opposite and inconsistent customs can not have immemorially existed, in the same place, and as to the same thing.

But the case is widely different in this country. Our ancestors brought with them the common law or general customs of England, but none of the particular customs. The common law became the law of our whole state, and gave the rule

to every part of it; and we have seen that, by that law, the off-going tenant was not entitled to the way-going crop. Any practice or usage, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom—because it lacks the essential ingredient of a good custom—it is not immemorial. It is clear that it could not have existed at any time, even as a recent custom, until after the settlement of the country, and after the common law had attached to every part of it. And nobody will contend that a recent usage or practice, however general, will change the common law. Nor is the case of the plaintiff in error helped by the argument, that the custom, although not obligatory as such, may nevertheless be looked to as having been within the contemplation of the parties at the time they contracted, and may therefore be regarded as an exponent of the contract. The principle of explaining a written instrument by parol testimony, applies to those cases only where there is some latent ambiguity in the written instrument, or where its terms have not a definite legal signification: *Bowyer v. Martin etc.*, 6 Rand. 525. Here there is no ambiguity, no uncertainty, no doubt whatever. It is nothing more nor less than a lease for a period fixed and certain, when the interest of the tenant is to cease and determine. To extend it beyond that period by parol testimony, is contrary to received principles, and utterly inadmissible.

I am clearly of opinion that the plaintiff in error was not entitled to the way-going crop; and this point being decided against him, it is equally clear that the county court ought to have given all the instructions moved for by the defendant in error. It may seem, at first view, that the third instruction is improper, as interfering with the province of the jury in deciding on the weight of testimony. But I do not think it liable to that objection. The court was not called on to say what facts were proved, but merely to say what the law would be on facts stated. I am for affirming the judgment of the circuit superior court.

The other judges concurring, judgment of circuit court affirmed.

Absent, BROOKS, J.

RUFFNERS v. LEWIS' EX'RS.

(7 LEIGH, 720.)

UNDER THE STATUTES OF VIRGINIA, upon the taking of the insolvent debtor's oath, the land of the insolvent vests in the sheriff of the county where the land lies, without any deed from the insolvent; and a deed from him attempting to convey it to the sheriff of another county is inoperative.

EJECTMENT CAN NOT BE MAINTAINED by a party in his own name who holds only the equitable or beneficial title to land.

WHERE A SUIT IS BROUGHT by a person who has taken the insolvent debtor's oath and certain of his creditors, seeking a recovery of an undivided interest in certain land in the adverse possession of certain of the defendants, a partition against a co-owner, and an accounting for the rents and profits, the sheriff in whom the legal title to the land is vested should be made a party; but if he is dead, and the necessity of making his heirs parties is waived, this is a sufficient excuse for not bringing them before the court.

WHERE THE FEE IS CONVEYED BY DEED to be defeated upon the performance of certain conditions, a subsequent deed of the land operates as a contract and conveys only an equitable title.

EQUITY WILL NOT ENFORCE an equitable title purchased by a party, which if the legal title, would subject him to the penalties of the statute against buying and selling a pretended title.

THIS PRINCIPLE DOES NOT APPLY to every purchaser of equitable rights, as where a creditor purchases his debtor's property to protect himself.

WHERE, IN AN ACTION FOR THE RECOVERY of a certain interest in a tract of land, for a partition and for an accounting of the rents and profits, one of the plaintiffs died after a decree had been entered ascertaining their rights, partitioning the land, and directing a conveyance to be made, the action may be revived in the name of the deceased plaintiff's executors, and not in the name of his heirs, the former being entitled to the rents and profits.

WHERE ONE TENANT IN COMMON holds the common property to the exclusion of his co-tenant, he is not chargeable with rents or profits where none have been made, provided he has employed the property in good faith with a view to make it profitable, but has failed in doing so; nor is he chargeable with speculative profits where the real profits are susceptible of being ascertained.

WHERE TENANTS IN COMMON have occupied the common property to the exclusion of a co-tenant, they are entitled, in an accounting for the rents and profits, not only to a credit for their expenses and services actually rendered in operations upon the common property which have made it of great value, but also for expenses, and for labor and services rendered in endeavoring to make it valuable, though unsuccessfully, they having acted *bona fide*, and only with a view of increasing the value of the property.

WHERE AN ACCOUNTING IS HAD between tenants in common, the expenditures of each year should be offset against the rents and profits of that year, and the claim for improvements in any one year should be liquidated in whole or in part by the rents and profits of that or any succeeding year.

On July 25, 1801, George Alderson, being indebted to William Griffith in the sum of one hundred and ninety pounds ten shillings, conveyed to Edward Graham one moiety of a tract of land on Kanawha river, on which he resided, containing one hundred and twenty-eight acres in trust, that if such indebtedness should remain unpaid on June 25, 1805, then Graham should sell one half of said land, which was to be divided on the day of sale by three persons, to be selected by the parties, one by Graham, one by Alderson, and the two thus chosen to select a third. If the debt was paid before the sale, the deed was to be void. This deed was rendered in the court of Kanawha county at the September term, 1801. On September 8, 1801, Alderson conveyed to John Reynolds and Allyn Prior a particular part of said land by metes and bounds. This deed was also recorded at the September term, 1801. Alderson, on March 1, 1805, entered into an agreement with David and Joseph Ruffner, by which he agreed to convey to them in fee the land upon which he lived, and also an adjoining tract. Possession was to be delivered to them immediately of all the land, except a certain field, which was not to be delivered until March, 1806. The Ruffners agreed to pay five hundred pounds for the land, in installments, but nothing was to be paid until the deed of trust from Alderson to Griffith should be delivered to them. This agreement was recorded at the September term, 1805. George Alderson died in 1805. On June 22, 1805, the heirs of Griffith, he having died, transferred, by an agreement in writing, all benefits they might derive from the deed of trust of July 25, 1801, to Joseph Alderson, who assigned such agreement to the Ruffners. On October 26, 1805, Abraham Baker, Silas Reynolds, and Henry Harman, having been selected to divide the lands as provided in the deed of trust, divided it into two equal parts, and conveyed one part to Graham, the trustee, who sold it, under the deed of trust, to the Ruffners. The deed to them by the trustee embraced that part of the land conveyed to Reynolds and Prior. On June 17, 1813, Prior, being in custody of the sheriff, under an execution at the suit of Thomas Edgar, took the oath of insolvency, and conveyed to the sheriff of Mason county his real estate, which included his interest in a certain salt well and works, and the land adjoining on the river Kanawha, in Kanawha county, then held by the Ruffners. The land so conveyed to the sheriff, as well as the interest in the salt well, etc., was sold at public sale, and purchased by Andrew Lewis and Lewis Summers. On September

3, 1818, Sarah Alderson, widow of George Alderson, released to Reynolds, Lewis, and Summers, her interest in the land conveyed to Reynolds and Prior. On September 20, 1821, a deed was executed, between Prior and wife and Summers of the first part, Andrew Lewis of the second part, and Thomas Edgar of the third part, reciting that Summers and Lewis had, together with Reynolds, commenced a suit for the recovery of the land conveyed to Prior and Reynolds, and that the bill, as to Lewis and Summers, had been dismissed, because the chancellor considered that the sheriff of Mason county had no right to sell and convey land in Kanawha county; that Prior and wife and Summers, with the consent of Edgar, shown by his being a party to the deed, conveyed to Lewis a moiety of the tract of land conveyed by George Alderson to Prior and Reynolds. The conveyance was in trust to Lewis, authorizing him to sue in his own name or in that of Prior, or both, to recover the rents and profits of said moiety from the Ruffners, or any other person liable therefor, and to pay: 1. The expenses incurred in the recovery thereof; 2. Edgar's debt; 3. To Summers and Lewis certain debts; 4. To Lewis a certain other debt; and, 5. The balance to Prior. This deed was duly recorded, and in pursuance thereof a bill was filed by Andrew Lewis, Allyn Prior, and Thomas Edgar, against David and Joseph Ruffner, John Reynolds, and Edward Graham. The subpoena was issued October 5, 1821, and the bill filed in the following April. It charged, that when the agreement of March 1, 1805, was entered into, the Ruffners were apprised of the claim of Prior and Reynolds under the deed of September 8, 1801, and that the land conveyed by the deed was not embraced in said agreement. That nevertheless the Ruffners took possession of the land conveyed to Prior and Reynolds, and for the purpose of defeating the claim of Prior and Reynolds, they colluded with the executor of William Griffith and Joseph Alderson, the brother and executor of George Alderson, to obtain an assignment of the trust deed, instead of a release thereof, notwithstanding they retained the purchase money agreed by them to be paid to said George, and were therefore at all times in possession of sufficient funds of said George to pay the debt secured by the trust deed. The plaintiffs claimed that the trust deed was extinguished notwithstanding the assignment; and that if the trust remained in force, the division and sale of the land by the persons appointed in accordance with the trust deed after George Alderson's death were irregular and illegal. The

bill prayed that a moiety of the ten acres, the quantity conveyed to Prior and Reynolds, be decreed to Lewis as claiming under Prior, and that an account be taken of the rents and profits. David Ruffner demurred to the bill, because Prior's interest had become vested in the sheriff of Kanawha county upon his taking the oath of an insolvent debtor, and the sheriff had not been made a party, and because Andrew Lewis had no interest in the land in dispute, because the deed of September 20, 1821, was void, being against public policy and against the law prohibiting the conveying or taking pretended titles. The answer of David Ruffner set forth that the purchase by himself and Joseph, of March 1, 1805, was of all the land in Kanawha county that George Alderson lived on. That the deed of trust to Edward Graham was to be delivered to them in order that the land might be freed from all incumbrances, and that in order that the deed might be transferred to them, Joseph paid to George Alderson three hundred and ten dollars to procure the deed of trust, but that the money was not appropriated as understood, but applied by George Alderson to other purposes. That on September 21, 1802, the land had been still further incumbered by a title bond executed by George Alderson to Joseph Alderson for two hundred pounds, which defendants David and Joseph purchased and satisfied. That being desirous of obtaining the deed of trust, they procured Joseph Alderson to purchase it for them, which was done and the deed assigned to them. That the said payments were considered by them as amounting to the five hundred pounds agreed by them to be paid to George Alderson. During the pendency of the suit Prior and Edgar died, and the suit was revived in the names of their representatives. The bill was taken as confessed, as to the defendant Joseph upon an order of publication, and as to the defendants Graham and Reynolds upon a decree nisi. It was admitted that the sheriff of Kanawha county for 1813 was dead, and the necessity of conventing his heirs at law was waived.

On November 18, 1829, the cause was heard upon the bill, answer, and exhibits, examination of witnesses, and the papers and proceedings in the suit mentioned in the deed of September 20, 1821. The court determined, that Allyn Prior and those claiming under him were entitled to a moiety of the land described in the deed from George Alderson to Allyn Prior and John Reynolds, and directed that the land be divided into two equal parts by commissioners, and that

they assign one moiety to Lewis, and that an account be taken of the rents and profits of the land embraced in the deed of September 8, 1801, deducting the value of the permanent improvements, which defendants had or might have received from the first day of January, 1806, to the time of taking the account; also from the first day of October, 1811, being five years before the commencement of the former suit referred to in the deed of September 20, 1821, and from the sixth day of October, 1816, being five years from the commencement of the present suit, to the same time, stating a moiety of each. Upon the commissioners' report being filed, a moiety of the land and the undivided moiety of the salt well were assigned to Lewis; and Reynolds having conveyed all his interest in the land to the other defendants, they were decreed, November 27, 1830, to convey to Lewis the moiety of the land and salt well, together with the right of piping the water thereof so as to have the free use of the well. On motion of the defendants David and Joseph, the master commissioner, in taking the accounts, was directed to state an account of the expenditures of the defendants in procuring or attempting to procure salt water. To the report of the commissioners certain exceptions were filed by the defendants, three of which were as follows: They excepting to the account because no credit was given to them for expenses incurred in boring for salt water in 1806 and 1807, and without which it would not have been discovered. Also because no credit was allowed them for certain furnaces erected by them on the land in making salt, from the sale of which profits had accrued. The report was also excepted to because no allowance was made to the defendants for their personal labor in improving the land. These exceptions were at first allowed, and a new account directed to be taken, but on the report being filed, the court rescinded its order allowing the exceptions of the defendants, and approved the account as first reported, and rendered judgment against Joseph and David Ruffner for three thousand and ninety-nine dollars and eighty-three cents, and directed the money when paid to be distributed as provided in the trust deed of September 20, 1821. On October 11, 1833, Lewis having died, his executors were substituted, and the cause revived in their name. David and Joseph Ruffner appealed.

Johnson and B. H. Smith, for the appellants.

B. G. Baldwin, for the appellees.

CARR, J. This case has been well argued; and agreeing as I do in the general views of my brother Tucker, I shall be very brief in touching some of the outlines of the case. I think the court has jurisdiction, because Prior had no legal estate in the moiety of the ten acres, but an equity only: and further, because, if he once had the legal estate, it was divested by his oath of insolvency, and vested by the law in the sheriff of Kanawha, where the land lay. It seems to have been the idea, that the deed of the insolvent conveyed his property; but this is a clear mistake. By the express words of the act, the estate of the insolvent, not only that contained in the schedule, but "any other estate which may be discovered to belong to the prisoner, shall be vested in the sheriff of the county wherein such lands, tenements, goods, and chattels shall lie or be found;" and this has been the positive law ever since the year 1769: 8 Hen. Stat. at Large, 326; whereas the law requiring the prisoner to deliver up the personal and convey the real estate, was first enacted in 1799; though not as repealing the other, for they both stand together in the law to the present day. Lewis, then, and Summers, the purchasers under the sale of the sheriff of Mason, acquired no title to the land: it was vested in the sheriff of Kanawha, for the benefit of Edgar, the creditor at whose suit Prior was in execution. And the most serious objection I have encountered in this suit, is the fact that the sheriff of Kanawha was not made a party; a fact which would have had much weight with me, but for what has happened in the court below. There, when the objection was taken, and the court gave leave to amend the bill by making the sheriff a party, it was acknowledged by the defendants that he was dead, and the necessity of making his representatives parties was expressly waived. Taking this into consideration, and further, that the sheriff is a mere trustee for the benefit of the creditor, and that creditor a plaintiff in the bill praying the aid of the court, I do not think the objection should avail to reverse the decree. It may be further said, that this is a suit for the legal title, and also for partition. I am satisfied, both on the subject of parties and jurisdiction. I do not think this a case either of maintenance or pretended title. It is the case of creditors scuffling for their money, and the debtor willing to help them, by suffering them to aid in the recovery of his right, not for their profit in the way of speculation, but so far as the payment of their just debts may go. In this view it is like the case of *Allen etc. v. Smith*, 1 Leigh, 231, and the case there cited,

and also the case of *Hartley v. Russell*, 2 Sim. & Stu. 244; 1 Cond. Eng. Ch. 439.

I think, however, the accounts have been taken wrong. The Ruffners must be treated as tenants in common with Prior; not as trespassers. They are liable for a fair share of the profits, and entitled to full compensation for their expenses fairly and reasonably incurred, as well those attending their abortive efforts to find water, as their more fortunate ones.

TUCKER, P. The first question in this case is as to the jurisdiction of the court; and that, I think, is easily disposed of. When Prior took the insolvent debtor's oath in 1813, his deed for the land in question not only operated nothing, because it was without a sufficient consideration to raise an use and to give effect to a bargain and sale, and because the sheriff of Mason had no right to receive such a deed, but the land itself immediately vested, without deed, in the sheriff of Kanawha county, within which the land lay: 1 Rev. Code, c. 134, sec. 34, p. 538; *Shirley v. Long*, 6 Rand. 735. The consequence was, that Prior's legal title was divested, that the beneficial interest or equitable right to the estate was in Edgar, the creditor, to the amount of his demand, and in Prior for the residue. Thus circumstanced, it was impossible for Edgar or Prior to maintain an ejectment in their own names. The action indeed might have been brought in the name of the sheriff, if he was alive at the institution of this suit. But if, by analogy to the case of an ordinary trustee and *cestui que trust*, we even suppose that the creditor and debtor could control and direct this trustee (not a trustee of their own creation, but the creature of the law), yet it would not follow that the *cestuisque trust* would not have a right to assert their claim in a court of equity. Before the recent act of assembly passed in 1821, even an assignee, and much more a transferee, of a bond might sue in equity, though there was no doubt he might use the obligee's name and sue also at law: 6 Munf. 23.¹ In the case of a *cestui que trust* of lands, I am not aware of any case which has deprived him of his right to sue in a court of equity, merely because an action might be maintained by his trustee at law.

I am therefore of opinion that the court had jurisdiction, even if the sheriff of Kanawha had been living, which does not appear. As to the obligation on those interested, to hunt up his heirs and sue in their names, and encounter all the embarrassments incident to such a proceeding, it could not surely

1. *Winn v. Bowles*.

be insisted on by a court which considers itself the peculiar protector of the rights of the *cestui que trust*. That court will not turn him from its doors upon such pretenses, or involve him in embarrassing litigation, to avoid giving him relief. Under this view of the case, it is true, the sheriff or his heirs should in strictness be parties, but the necessity of making them so was expressly waived, as appears by the decree. But this is not all. Prior, in my opinion, never had the legal title. The deed of bargain and sale was made to him after the legal title had been passed away by the deed of trust to Graham: and though that deed was defeated and avoided by the payment in June, 1805, before the day of payment arrived, yet between its date and the performance of the condition, the fee was in Graham. For where an estate in fee is conveyed upon condition, so complete is the title of the feoffee or bargainee, that his wife is entitled to dower, though that right will be defeated by entry upon the performance of the condition: 1 Cru. Dig. 192; 2 Id. 42. Graham therefore had the fee, and the bargain and sale could only operate as a contract, and of course gave but the equitable title.

Believing, from these views of the case, that there is no reasonable doubt of the jurisdiction, I proceed to consider next whether this is a case of maintenance, which is not entitled to the countenance of this court. In support of this position, the case of *Allen v. Taylor*, decided in the court of appeals at Richmond, has been cited, and the case of *Morrison v. Campbell etc.*, 2 Rand. 206. I am ready to admit that equity will not enforce an equitable title, purchased by a party under circumstances which, if it were a legal title, would subject him to the penalties of the act against buying and selling a pretended title, which was the position taken by Judge Brooke in *Allen etc. v. Smith*, 1 Leigh, 254. But with this admission I think it perfectly consistent to say that, as a general principle, the act does not apply to every sale and purchase of equitable rights. Such was the decision in that case; and in the case of *Wood v. Griffith*, 1 Swans. 43, Lord Eldon says: "It is extremely clear, that an equitable interest under a contract of purchase may be the subject of sale. If I were to suffer the doctrine to be shaken by any reference to the law of champerty, I should violate the established habits of the court." I do not rest this case, however, upon this general doctrine; for I am free to acknowledge that if Andrew Lewis had, before Prior's insolvency, purchased of Prior his right, whether it be legal or equitable, while the

Ruffners were in possession claiming title whether legal or equitable, this court would not countenance the transaction. That, if I mistake not, was the precise case of *Allen v. Taylor*. Taylor, there, of his own mere motion, intruded himself, by a voluntary purchase, into the contest between the other parties.

But Andrew Lewis, in this case, does not stand before the court in the light of a party who, without other motive than the desire of an advantageous speculation, meddles in the feud of others. He stands, as does Edgar also, in the favored light of a creditor, who is held to be justified in gathering up the wreck of his debtor's property, to save himself from sinking. It is with him the *tabula in naufragio*, and he is justified in seizing it. This distinction is recognized and acted upon by the decision in *Allen etc. v. Smith*,¹ and also in the case of *Hartley v. Russell*, 2 Sim. & Stu. 244; 1 Cond. Eng. Ch. 439. That was a case where a creditor, who had sued his debtor, agreed to abandon his suit on the debtor's giving him a lien on securities in the hands of another creditor, with authority to sue that creditor; and the creditor agreed to use his best endeavors to recover the securities. The court held that the agreement did not amount to champerty, as there was no stipulation that the creditor was to have the profits to be derived by the debtor from the suit. He was only to receive payment of his debt. So here, Andrew Lewis, by the terms of his contract, is to pay over to Prior the excess after discharging the debt. He is in fact an incumbrancer only, not a purchaser; and I am not aware that a *bona fide* creditor can not take a lien on the equitable estate of his debtor, notwithstanding an adverse claim.

We have, however, stronger authority for this doctrine than the decided cases. We have the act of assembly. If this be champerty, the statute commits the first act of champerty. It provides that where an insolvent debtor takes the oath of insolvency, the estate contained in his schedule, with any other estate which may be discovered to belong to him, for such interest therein as such prisoner hath, and may lawfully depart withal, shall be vested in the sheriff. No one has ever supposed that a debtor, who had a good title to a tract of land which was in the adverse possession of another, was absolved from surrendering it in his schedule, or that it was not vested in the sheriff. The pretended title, if such it be, therefore passes by the law itself to

the sheriff, and he is moreover required to set it up and sell it to the highest bidder; so that here was an express authority to the sheriff of Kanawha to sell, and to any person to purchase, this supposed pretended title. And why? Because the insolvent debtor being ruined, and his creditors likely to suffer, the law deemed it proper to provide for the disposition of the wreck of his estate for their benefit. And if the purchase of Andrew Lewis at a sheriff's sale would not have been champerty, by what reason shall it be so adjudged, when, the sheriff being dead, the debtor, with the assent of his creditor, transfers the property, not in absolute ownership, but only as a security for his debts, vesting in one of his creditors the power of prosecuting the demand, as was done, in the case already cited of *Hartley v. Russell*?¹ I can not, for my own part, conceive; and am therefore of opinion that the transaction is unassailable.

It has been earnestly objected, that on Lewis' death, his heirs and not his executors should have been made parties. I think not. The question of title was settled as long ago as 1829, and in 1830 a decree was rendered, confirming the partition made under the former order, and decreeing a conveyance. The cause then proceeded for the rents and profits only, to which the executors were entitled; and they were therefore the proper parties. The act of assembly authorized the revival on motion, and the court having ordered the revival, we must presume the motion to have been made. If the parties in whose name the revival was made were not executors, the defendants could have had no difficulty in contesting the fact.

Thus far the case seems to me altogether in favor of the complainants. For the residue, it is in various respects decidedly against them. I have no doubt that in this case the account, as taken under the orders of the court, does the defendants great injustice. First, as to rents and profits: I have no question that in the settlement of them, the Ruffners ought to be treated as tenants in common with Prior and those claiming under him. They claim to hold Reynolds' interest at a very early period, by contract with him; and therefore held in his right one moiety, while they wrongfully took the exclusive enjoyment and possession of the other moiety, which did not belong to them. Out of this relation grows, I think, the principle that they ought not to be charged with rents or profits where none have been made (provided they appear to have employed the property in good faith with a view to make it profitable, but have failed in doing

so), nor with speculative profits, where the real profits are susceptible of being ascertained. I am not aware, however, that this relation would have prevented the operation of the statute of limitations, had it been pleaded. But as it was neither pleaded, nor relied on before the commissioner, it must be taken to be out of the case. The party might have pleaded the statute to the bill, or upon the account he might have insisted upon it before the commissioner. For if the defense is set up before the commissioner, the answer to that defense may also be produced. But if the objection be permitted to be made by way of exception only in court, it can not be properly answered there.

Secondly, as to improvements: I am clearly of opinion that the defendants were not only fairly entitled to a credit for their expenses and actual services (not their invention and talent in contriving the machinery, etc.) in the successful operation which terminated in rendering the property of great value, but also for their expenses, labor, and services in their unsuccessful experiments. The plaintiffs, if they will have advantage from their successes, must be content to share in their disappointments and failures. He who takes the profit must share the burden. Their works were prosecuted under the impression that the property was their own. Their *bona fides*, therefore, can not be doubted. They can not be suspected of reckless expenditure, or of wild and extravagant adventures. They appear to have been as prudent and sagacious, as zealous and persevering. The plaintiffs are now to have the benefit of the labors of their lives, the fruits of their sagacity, and the harvest of their untiring energy and perseverance. They can not therefore reasonably object to share in their outlay. For many a sleepless night and anxious day the defendants must still expect to go unpaid, for these admit not of estimate. But what they have expended in the *bona fide* pursuit of their great and meritorious object, ought to be unstintingly repaid. In taking this account, the expenditure of each year should be offset against the rents and profits; and thus we may approximate, at least, to justice between the parties. For thus, whether the act of limitations be or be not relied upon, the claim for improvements in any year will be liquidated, in whole or in part, by the rents and profits of that or any succeeding year. It remains only to add, that the commissioner has given credit to the Buffners for the expense of certain permanent improvements—sinking a gum, boring the rock, tubing it, and reaming: but

he has given them no credit for the furnaces and machinery necessary for making salt. These fixtures, as well as the others, were made at the expense of the Ruffners. It should be ascertained what they were worth at the time partition was made under the decree, and the Ruffners should have credit for one moiety thereof.

BROCKENBROUGH and CABELL, JJ., concurred in the opinion of the president.

Decree reversed, and cause remanded for further proceedings.

ACTION BY ONE CO-TENANT AGAINST ANOTHER FOR RENTS AND PROFITS.—At the common law one co-tenant had no remedy against another, who received all the rents and profits of their common property: *Chambers v. Chambers*, 14 Am. Dec. 585, 586, note. This rule has been changed by statute both in England and in this country: *Id.* 587, note.

IMPROVEMENTS BY ONE CO-TENANT.—Expenses incurred by one joint owner in improving the common property, must be borne ratably by all, where no objections were made to the making of the expenditures: *Percy v. Millaudon*, 17 Am. Dec. 196; but one tenant in common or joint tenant can not improve the common property, without the consent of his co-tenants, and then hold the common property until reimbursed a proportion of the money expended: *Crest v. Jack*, 27 Am. Dec. 353.

ONE TENANT IN COMMON, WHEN ENTITLED TO THE PROFITS OF THE COMMON ESTATE.—Where one tenant in common enters upon the common estate, which yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by reason of such improvements, to the exclusion of his co-tenant: *Nelson's Heirs v. Clay's Heirs*, 23 Am. Dec. 387.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

SALTMARSH v. BEENE.

[4 PORTER, 282.]

A TRUSTEE CAN NOT PURCHASE at his own sale, either directly or indirectly, and a sale made to himself of the trust estate or to another for his benefit, will be set aside.

AN AGREEMENT ENTERED INTO BY A COMMISSIONER appointed by the orphan's court, to sell real estate, by which the property to be sold is to be purchased by another person, and afterwards divided between them, will not be enforced in equity.

ERROR to the circuit court of Dallas, on a decree of the chancery side of that court, dismissing a bill for the specific performance of a contract in writing, by which Beene agreed to convey to Saltmarsh one half of a certain tract of land. The other facts are stated in the opinion.

Peck, for the plaintiff in error.

Clark, contra.

COLLIER, J. This cause comes up by appeal from the equity side of the circuit court of Dallas county.

From the record we learn that the plaintiff here, together with two other individuals, were appointed commissioners, by the judge of the county court of that county, to sell at public auction the real estate of Thomas Ewing, deceased. That both the plaintiff and defendant being desirous to purchase, the one the west and the other the east half of a quarter section of land, belonging to the estate, on the day of, and immediately preceding the sale, they agreed in writing to purchase the quarter section, and divide it by assigning each to the other, the part

respectively stipulated for in their agreement. At the commissioners' sale, Beene became the purchaser, complied with the terms of sale, and received a deed, executed by all the commissioners. Afterwards, being called upon to execute his contract, by making a deed for the west half, to the plaintiff, he refused to do so, but with a reservation of a right of way through the same. The plaintiff declining to yield to this requisition, the defendant brought an action at law, to eject him from the possession, which he had before acquired. And thereupon the plaintiff filed his bill to enjoin a trial at law, and to compel the defendant to perform his contract by executing a deed.

The argument of this cause has taken a wide range, and many questions have been discussed, the consideration of which is rendered unnecessary by the view we shall take of it. The first question which naturally presents itself, is this—has the plaintiff acquired a right, by his contract with the defendant, which a court of equity will regard and protect? This must depend upon his right to purchase at the commissioners' sale. By the civil law, the same person can not be both buyer and seller; "because, if he were permitted to be the purchaser, his duty and his interest would stand in direct opposition: for, as the representative of the owner, it would be his duty to bargain for the highest price, while as purchaser, it would be his interest to give the lowest." For these reasons, and to guard against frauds, which in many instances would be beyond human detection, that law inhibited purchases by persons thus circumstanced.

This rule of the civil law is practiced upon in our courts of equity, and applied to trustees, agents, and generally to all persons who have been employed in a confidential character in relation to property: *Whichcote v. Lawrence*, 3 Ves. jun. 740; *Campbell v. Walker*, 5 Id. 678; *Lister v. Lister*, 6 Id. 631; *Green v. Winter*, 1 Johns. Ch. 27 [7 Am. Dec. 475]; *Crow v. Ballard*, 3 Bro. C. C. 117; *Lord Hardwicke v. Vernon*, 4 Ves. jun. 411; *Ex parte Reynolds*, 5 Id. 707; *Ex parte Lacey*, 6 Id. 625; *Owen v. Foulkes*, Id. 630, note; *Ex parte James*, 8 Id. 337; *Parkist v. Alexander*, 1 Johns. Ch. 394. And it is immaterial whether the sale be made privately or at public auction, the reason of the rule is as strong in the one case as the other; though the chances for detection would be more favorable in the latter than the former, if any unfairness were practiced by the purchaser.

See the case of the *York Buildings Company v. McKensie*, 8 Bro. P. C. 42, Toml. ed.

Nor does it make any difference though there be a plurality of trustees. A sale by one trustee to his co-trustee, is illegal: *Ringgold et al. v. Ringgold et al.*, 1 Har. & G. 11 [18 Am. Dec. 250]. Each owes to his situation the same duty that all do, and is, therefore, not permitted to do any act which may tempt him from its honest performance, or give him an interest adverse to his constituent.

It is a well-established rule of law, that a man can not do, indirectly, that which it is unlawful to do directly. If, then, the plaintiff could not have purchased at the commissioners' sale (of which we have no doubt), it was certainly incompetent for him to have purchased through the agency of the defendant. Such a purchase is obnoxious to every objection that could be urged against a purchase by the plaintiff, directly, with a force increased, by the increased difficulty of detecting any unfairness in the sale. While a trustee is restrained from purchasing at a sale made by himself, in that character, either personally or through the intervention of an agent, he can not at such sale become the agent of a purchaser: 1 Liv. on Agen. 425; *Ex parte Bennett*, 10 Ves. jun. 381.

The doctrine as to purchases by agents or persons exercising a confidential character, is founded rather upon general principles, than upon a state of facts as applicable to any particular case. In *Ex parte James*, 8 Ves. jun. 345, it was decided that the purchase was not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance—no court being equal to the investigation and ascertainment of the truth in much the greater number of cases. Lord Roslyn was of an opinion, that to authorize the sale to be set aside, it should be shown that the agent or trustee had gained an advantage by the purchase: *Whichcote v. Lawrence*, 3 Id. 750. But the correctness of Lord Roslyn's opinion is denied by Lord Eldon, in the cases of *Ex parte James* and *Ex parte Bennett*, already cited. And the true rule now recognized in the courts of chancery, both in England and this country, is that laid down by Lord Alvanley, in *Campbell v. Walker*, 5 Id. 680, that a trustee purchasing the trust property, is liable to have the purchase set aside, if in any reasonable time thereafter the *cestui que trust* makes known his dissatisfaction: 1 Story Eq. and cases referred to.

If the general interests of justice inhibit the purchase of the

trust property by the trustee, either by himself or an agent, it follows necessarily that he can not purchase jointly with another. The plaintiff, by whatever name he may be technically designated, must be regarded in equity as a trustee, subject to all the rules of law that are applicable to purchases made by individuals standing in that character. And a purchase made by the defendant for the joint benefit of himself and the plaintiff, may be considered as if made by the plaintiff himself, if it were necessary. If a trustee purchase the trust property, and receives the proper evidences of title, his title will prevail against all strangers, and he may reclaim the property if dispossessed, or may maintain an action for any injury it sustains. But he can not enforce a contract entered into, in contemplation of a purchase which is subsequently made. The policy of the law forbids the trustee from speculating upon the confidence reposed in him; and by removing temptation makes him incapable of doing so; and equity can never enforce a contract denounced by the policy of the law, the more especially when the public interest does not demand relief.

In treating of agreements in fraud of the policy of the law, Mr. Justice Story, in his treatise on equity, says: "In general (for it is not universally true), where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita*, or *mala in se*, courts of equity, following the rule of law, as to participators in a common crime, will not, at present, interpose to grant any relief—upon the known maxim *in pari delicto potior est conditio defendentis et possidentis*." The exceptions to the general rule, are found to be cases where the public interest would be promoted by granting relief: and then it is given to the public through the party. As coming within the exception, may be enumerated contracts violative of the laws to prevent usury, gaming, etc. There, the policy of the state demands relief. The learned author just cited remarks: "The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity: but the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is to leave the parties where it finds them, giving no relief, and no countenance to claims of this sort:" 1 Story Eq. and cases cited in note. To the same effect are *Carrington v. Caller*,¹ and *Holder v. Meggison*, 2 Stew. 175.

Influenced by these considerations, we are brought to the conclusion that it is incompetent for equity to enforce the per-

formance of the agreement set up by the bill, and must therefore leave the plaintiff, in the language of a very great judge, to "a sole reliance upon personal honor."

In attaining this conclusion, we have not thought it necessary to consider the discretionary power exercised by courts of equity, upon applications for the specific performance of contracts, but have placed our decision upon the ground of the invalidity of the agreement.

In the case of *Brannan et al. v. Oliver*, 2 Stew. 47 [19 Am. Dec. 87], in some of the reasoning employed in favor of the right of an administrator to purchase at a sale of the intestate's estate, the court may seem to countenance the right of every description of trustee to purchase the property of his *cestui que trust*, when sold under an order of court, and at public auction. But the gravamen of the argument employed, is this, that it was a practice of long continuance in this state, for executors and administrators to purchase at sales of the estates they represented, and that incalculable injury would result from a decision in opposition to that practice. And further, that the widow or some near relative was most usually the personal representative, and solicitous to purchase some portion of the estate, and unless allowed to do so directly, would procure some third person to become the purchaser, under such circumstances as to prevent detection, and procure through him the ownership. Neither of which reasons has any application to one circumstanced as the plaintiff. So much as was said in that case, touching sales at auction under the order and supervision of a court, was intended not to justify a departure from the strict rule; but to show that a departure to which we were forced, in order to prevent the unsettling of titles and consequent litigation, was the less to be regretted in such a case; the opportunities for the detection of fraud being more favorable than where the sale was private. It may be very well to remark further in regard to that case, that it does not determine the right of all administrators and executors to purchase, but only such as have an interest coupled with the trust. It is not pretended that the plaintiffs' was more than a naked trust.

The decree is affirmed.

GOLDTHWAITE, J., not sitting.

TRUSTEE CAN NOT PURCHASE AT HIS OWN SALE.—It is now well settled that a trustee can not purchase at his own sale, either in person or by another, and a sale made to himself of the trust estate is invalid, and the *cestui que trust* is entitled as of course to have it set aside: *Dorsey v. Dorsey*, 6 Am.

Dec. 506; *Singstack v. Harding*, 7 Id. 669; *Davis v. Simpson*, 9 Id. 500; *Murdock's case*, 20 Id. 500; *Hunt v. Bass*, 24 Id. 274; *Armstrong v. Campbell*, Id. 556. If, however, the *cestui que trust* acquiesces in the purchase by the trustee, it will bind him: *Jennison v. Hapgood*, 19 Id. 258. So a sale of the trust property by one trustee to his co-trustee is a breach of the trust, for which both are liable: *Ringgold v. Ringgold*, 18 Id. 250. In *Brannan v. Oliver*, 2 Stew. 47; S. C., 19 Am. Dec. 37, it was held, that an administrator might purchase at his own sale, and that the same is not *per se* void, but *prima facie* valid. That case is very unusual in its character, and can hardly be supported upon authority: See the note thereto, criticising the decision. In the principal case, *Brannan v. Oliver* was cited and relied upon by the appellant to show that a trustee might purchase at his own sale. The court held, however, that the decision in that case was not intended to change the general rule above stated, but that they were forced to that decision to prevent the unsettling of titles and consequent litigation resulting from a long-continued practice in Alabama, of executors and administrators purchasing at sales of property belonging to the estates they represented.

SPECIFIC PERFORMANCE OF CONTRACTS BY COURTS OF EQUITY.—See for a general discussion of this subject: *Seymour v. Delancey*, 15 Am. Dec. 299 *et seq.*, note; *Anderson v. Green*, 23 Id. 423, note; *Atwood v. Cobb*, 26 Id. 661, note; *Hays v. Hall*, *post*.

HAYS ET AL. v. HALL ET AL.

[4 PONSER, 374.]

WHERE EITHER PARTY HAS PERFORMED a valuable part of his contract for the sale and purchase of an estate, and is in no default for not performing the residue, he is entitled to a specific performance of the other part.

SPECIFIC PERFORMANCE OF A CONTRACT will be decreed in equity whenever it is impossible to place a party in *statu quo* who has performed a valuable part of his agreement, and is in no default for not performing the residue.

TIME IS CONSIDERED THE ESSENCE of an agreement when it is made so by the terms of the contract, and also where a party who seeks relief has been in default himself, without any just excuse or any acquiescence or subsequent waiver by the other party.

WHERE THE SPECIFIC EXECUTION OF AN AGREEMENT respecting lands will be decreed between the parties, it will be decreed between all parties claiming under them in privity of estate, or representation, or title, unless other controlling equities intervene.

PURCHASE MONEY AGREED TO BE PAID by a party to a contract for the sale of land, is treated in equity as the personal property of the vendor, and as such goes to his personal representative.

SUCH REPRESENTATIVE HAS ALL THE REMEDIES to recover or retain such purchase money as the vendor would have if living, and in an action to recover the same he must make the heirs of the vendor as well as the vendee, and all other persons who have an interest in the matter, parties to his bill.

WHERE A. MADE AN AGREEMENT for the sale of lands with B. and C., and took the notes of the latter, with D. and E. as sureties; and A. gave his bond, conditioned to make titles to the lands. when the notes were paid;

and immediately afterwards B. and C. assigned the bond to D. and E. to indemnify them for becoming sureties; and subsequently A. dying, and D. and E. being in possession of the land, and D., exercising a control over them, paid the last note due, after suit, and took from A.'s representatives and heirs a bond conditioned for the executing of a title to D., within a specified time, and on the expiration of this time brought his action upon the bond, it was held, on a bill filed by A.'s representatives and heirs for a specific performance: 1. That A.'s administrator was entitled to a specific execution of the contract of his intestate, and that A.'s heirs were proper parties as complainants. 2. That the bond executed by the representatives and heirs was without consideration and void. 3. That it was proper for the complainants to make the matter of their bond a part of the case, and that equity might decree a cancellation thereof. 4. That the delay in filing the bill did not prevent the court from decreeing a specific execution of the agreement, because the parties holding the bond of A. could have applied to the orphans' court to have perfected their title. 5. That an equitable mortgage on the land was created by the assignment of the bond of the intestate A. by the vendees to their sureties, in favor of the latter, which might be foreclosed. 6. That all the heirs of the vendor, and of the assignee of the vendees, should be made parties before the relief sought could be decreed, and that for that purpose the decree should be reversed and proper amendments allowed in the lower court.

ERROR to a decree of the circuit court of Lowndes county, exercising chancery jurisdiction. The facts are stated in the opinion.

Thorington, for the plaintiff in error.

Clarke, *contra*.

HOPKINS, C. J. The bill, in this case, was filed by Richard H. Hays, Patrick W. Hays, Robert S. Hatcher, and Nancy, his wife. Before the cause was heard in the circuit court of Lowndes county, Patrick W. Hays died, and his executrix, Martha B. Hays, was made a party to the bill, as one of the complainants.

The material allegations of the bill, which we deem it necessary to consider, are, that James Hays, the father of the complainants, Richard H., Patrick W., and Nancy Hatcher, sold in November, 1826, the lands that are described in the bill, to Edmondson and Goodall, two of the defendants, at the price of two thousand dollars. That the purchase money was to be paid in two installments, and for which the purchasers gave two notes to the vendor, with Hall and Lucas, who were also defendants to the bill, as their sureties. One note was payable the first of January, 1827, and the other the first of January, 1828. That the vendor made his bond to the vendees, in the

penal sum of five thousand dollars, conditioned to be void, if he should, upon the payment of the two notes, or soon after, convey a good and legal title, in fee simple, to the lands, to the vendees. That the bond was, upon the day of its date, assigned by the vendees to Hall and Lucas, to indemnify them against the liability they had incurred, as sureties for the purchase money.

That, in 1827, the vendees put the assignees, or Hall, one of them, into the possession of the premises, for the benefit of the assignees, and that Hall had received a large sum of money, as the rents of the land. That the lands, since the sale, have been greatly injured by cultivation, and diminished in value.

That in September, 1828, and before the payment of the note that was last payable, the vendor died intestate. That administration upon his estate was granted to the complainant, Richard H.; and his heirs at law were his three children, who are complainants, and the children of a daughter, Mary Merriweather, who died in her father's life-time. Her husband, who survived her, and her children, together with Allen Love, the husband of Martha G., who is one of the last-mentioned children, are defendants to the bill.

They allege that before the last installment of the purchase money was paid to the administrator, Richard H., he and the complainants, Patrick W. Hays and Robert S. Hatcher, made, on the twenty-first of April, 1829, their bond to the defendant, Hall, in the penal sum of five thousand dollars, conditioned to be void, if they should convey a good title in fee simple to the same lands, within four months from the date of their bond. That soon after the breach of the condition of their bond, Hall put it in suit, claiming to recover upon it the sum, with interest, which had been paid upon the sale of James Hays.

They allege, also, that Hall had, at the time they executed their bond, and still has the bond of James Hays, and that their own bond was made without consideration, as the former one is a valid and subsisting obligation against the representatives of James Hays, upon which the persons who are entitled to the benefit of it, have a summary remedy to obtain a specific performance of the agreement to convey the lands in an orphans' court.

As many of the allegations are not admitted in the answer, and were not proved upon the hearing of the cause, they are omitted in this statement.

Hall and Lucas both admit the agreement for the sale of the lands—the execution of the notes for the purchase money—of James Hays' bond, and the assignment of the latter to them, as stated in the bill. Hall admits also, that he still has the bond of James Hays; but denies that he ever had the possession of the lands, or exercised any control, or act of ownership over them, or had ever put a tenant in possession, or received any sum of money, as rent of the premises. He states, that upon the note which first matured, a judgment was obtained against Lucas, which was satisfied by Lucas and himself jointly. That suit was instituted on the other against him. That he employed counsel who had prepared a bill upon which he intended to apply for an injunction to stay the proceedings at law, until he could obtain a conveyance of the title to the lands, when it was agreed between himself and Richard H. and Patrick W. Hays and Robert S. Hatcher, that they should make the bond, which they executed, in consideration of the payment by him, of the sum due on the note, then in suit.

It was proved, on the hearing in the circuit court, by the deposition of W. Oliver, that he was authorized, in 1827, by a letter of Hall, that had been lost or mislaid, to sell or rent the premises, and that he did rent them to John Green and W. Pearce.

By the deposition of John Green, it was proved that he, one Autry and W. Pearce, rented the lands one year of W. Oliver, and that he paid the rent due from himself to Samuel W. Oliver.

It appears from the proofs, that Isaac Betts, one of the defendants, took possession of the premises, or a part of them, in the autumn of 1828 by the authority of Hall; that he had the possession as late as January, 1830; and that one Walker also entered upon the possession of a part of the lands on a contract with Betts.

A letter written by Hall, dated the second of October, 1828, and addressed to Samuel W. Oliver, is annexed to the answer of Hall as an exhibit. In the letter Hall informed Oliver, that Betts was authorized to take immediate possession of the premises, unless some of Hall's friends had previously rented them to some other person.

We conclude from the testimony, the possession of the lands was given to the purchasers, and that they have been occupied since the sale by persons who entered upon them as tenants of Hall, or by the permission of his tenants. It appears also from the proofs that the value of the premises has been reduced

greatly since the sale, and no other cause of this effect is shown by the testimony, than the failure of the persons who have occupied the premises to keep them in repair. Neither installment of the purchase money was paid punctually; each was paid by the sureties of the vendees after a suit had been instituted to compel payment. The vendor died eight or nine months after the last note was due. If the failure to pay the first installment punctually gave him a right to rescind the agreement, he waived the right by the acceptance of the money, and he acquiesced in the neglect to discharge the other note by asserting no claim to the possession of the lands. He was not bound to convey the title before the whole purchase money was paid, and he died in no default, because no right existed during his life to demand a conveyance of him. As he had acquiesced in the delay of the vendees to pay the purchase money, his personal representatives had a right to do so also. That he did so is proved by the fact that he afterwards received the balance of the purchase money. At no time before the whole purchase money was paid, had the purchasers any ground upon which they could have been permitted to avoid the specific execution of the agreement. The effect of their own default was against them, and in favor of the vendor and his representatives; and all benefit from that default has been waived by those who might have claimed it. If the last installment had not been paid, a bill might have been filed by the personal representatives of the vendor to compel a specific performance, and upon such a bill in such a case, the decree sought ought to be made. The vendor performed, during his life, a valuable part of the contract by parting with the possession of the lands, and had a right before his death, as the last note became due prior to that event, to a specific execution of the agreement.

The principle is well settled, that where either party has performed a valuable part of his contract for the sale and purchase of an estate, and is in no default for not performing the residue, he shall have a specific execution of the other part of his contract: 2 Story Eq. 82. This right the vendor did nothing, after he acquired it, to impair, and after his death it belonged to his personal representative, if he chose to claim it. The possession from which the vendor parted was never regained or claimed, either by himself, whilst he lived, or by his representatives after his death. The value of the lands has been diminished since the sale of them, by the want of proper care in those from whom it was required. The impossibility of placing a party in

statu quo, who has performed a valuable part of his agreement, and was in no default for not performing the residue, is another ground for the specific execution of the agreement: 2 Id. 83. If the sale could not be executed, the heirs of the vendor would be injured by the consequences of duties omitted, or of acts which were not the vendor's or their own. Time may be of the essence of an agreement in a court of equity. It is always essential, when it is made so by the terms of a contract; and it is considered so by some able chancellors, in every case, in which the party who seeks relief has been in default himself, without any just excuse, or any acquiescence or subsequent waiver, by the other party: 2 Story Eq. 85, 86; 1 You. & C. 415; 1 Johns. Ch. 370.

But for the acquiescence and acts of waiver, on the part of the vendor and his personal representative, the vendee never would have acquired a right to the specific execution of the agreement, in this case.

It is a general rule, that where the specific execution of an agreement, respecting lands, will be decreed between the parties, it will be decreed between all parties claiming under them in privity of estate, or representation, or title, unless other controlling equities are interposed. The rule is thus stated in 2 Story Eq. 96, 97.

The purchase money is treated, in equity, as the personal property of the vendor, and as such, goes to his personal representatives: 2 Story Eq. 98, 99. If it be unpaid at the vendor's death, the personal representative has a right to receive it. If the payment of the money and the conveyance of the estate, are according to the agreement, to be made at the same time, the personal representative would have a right, in a case where the time agreed upon for performance, was not of the essence of the contract, if in no other case, to a specific execution of the agreement, if he applied to a court of equity for the purpose, in a reasonable time after the day for performance.

The purchase money having been made the personal property of the vendor, by his own contract, his personal representative has a right to all the remedies to recover or retain it, to which the vendor would be, if he were living. When the representative goes into equity, he must make the heirs of the vendor, as well as the vendee, and all other persons who have an interest in the matter, parties to his bill. The heirs may, if they choose, unite with him, as complainants—otherwise, they must be made defendants.

By the contract, in this case, no day was fixed for the con-

veyance of the title. The vendor's bond required him to convey the estate, soon after the payment of all the purchase money. If the purchasers and their sureties had made no default, there is no reason to suppose the title would not have been conveyed by the vendor in his life-time according to his contract. Their defaults were acquiesced in, and waived by the vendor himself, and his personal representative.

It is a just excuse, for the omission of the administrator, in this case, to file his bill for the execution of the contract sooner than he did, that the purchasers could have obtained a specific execution of the agreement in the orphans' court of the proper county, by filing a petition against the administrator upon the bond of his intestate, and satisfying the court that it was fairly made. This statutory remedy is more summary and less expensive, than the proceeding in equity, in which the same object is attained: Aik. Dig. 95.

The vendees, and those who claim under them, can not complain of the administrator's delay in taking steps to enable him to have the title conveyed to them, when the consequence of any course he could have pursued, would have been longer delay than would have been the result of the prosecution by the vendees, of the remedy to which they only were entitled in an orphans' court: 1 Johns. Ch. 379; 2 P. Wms. 66.

The next question is, whether the bond which three of the plaintiffs in error made to Hall is valid. We think there is no consideration to support the bond. The payment by him of the last installment of the purchase money was what he was bound to do. Nothing that appears in the record would have been a good defense to the action at law upon the note, or have given him a right in equity, to enjoin a judgment upon it. As the vendor parted with the possession of the premises, and the vendees bound themselves to pay part, at least, of the purchase money, before the time fixed for the conveyance of the title, the promise to pay the whole of the purchase money was independent of the obligation of the vendor to convey, and the entire sum could have been recovered at law, without any averment in the declaration, of the vendor's ability to convey the estate. A plea in such a case, that the vendor had no title on the day fixed for the conveyance, would be no bar to the action, as this court decided, in the case of *Weaver v. Childress*, 3 Stew. 363.

There was no just claim to an injunction, from a court of equity; because the case shows the title could have been obtained, on a proper application to an orphans' court. That the com-

plainants, who made the bond to Hall, might have defended the action at law, upon it, does not deprive them, in this case, of their claim to relief in equity against their bond. The jurisdiction of the court might perhaps be maintained upon the principle, that it is against conscience for Hall to enforce the bond, and unjust to the obligors that he should retain it. He might take a nonsuit in the action now pending, and renew it again, hereafter, when the obligors could not prove that their bond was without consideration; and we will not decide, that equity might not exercise jurisdiction upon the principle of *quia timet*, and decree the cancellation of the bond: 2 Story Eq. 10, 11.

As equity has jurisdiction to decree a specific execution of the contract of James Hays, deceased, in favor of his administrator, it was proper for the complainants in their bill for a specific performance (for which object the bill, in this case, was filed), to make the matter of the bond to Hall, a part of the case. It is a settled rule, that if a court of equity have jurisdiction of a cause, for one purpose, it may exercise it generally: 2 Story Eq. 97.

There ought, we think, to be a decree for the cancellation of the bond, and for a perpetual injunction of the suit at law upon it, as well as for a specific execution of the contract for the sale of the lands, into which James Hays entered, in his life-time. The assignment by the vendees, of the vendor's bond to Hall and Lucas, created in favor of the latter persons, an equitable mortgage. If the purchase money which the sureties paid, did not belong to the vendees, and has not been repaid by the vendees, the sureties in this case, have a right to the estate, as mortgagees, upon a decree for the specific execution of the contract, in favor of the complainants. Such a mortgage they might foreclose as other mortgages may be foreclosed. It does not appear that John G. Merriweather had any interest which a decree in this case could affect, as his wife died before her father, James Hays. Betts also appears to have no interest.

So much of the decree as dismissed the bill, as to the defendants, John G. Merriweather and Betts, is affirmed, at the costs of the plaintiffs in error. But the decree, in all other respects, is reversed, and the cause is remanded, for the purpose of having the principles of the opinion of this court carried into effect. This court can not now make such a decree as ought to be made, because the circuit court made its decree before all the necessary parties were before that court. The heirs at law of the complainant, Patrick W. Hays, ought to have been made parties, before the decree of the circuit court was made. Hall

has died since the cause was brought into this court, and his executors have been made parties here; but it will be proper to make his heirs at law parties, before the case shall be heard again in the circuit court. All the amendments for these purposes may be made, after the case shall be again in that court, upon a mandate from this: 7 Pet. 130. There ought also to be either an answer from the wife of Love, or a decree, *pro confesso*, against her.

The plaintiffs in error must be allowed the costs of this court upon so much of the decree of the circuit court as is reversed against the defendants, Goodall, Edmondson, Lucas, and the executors of Hall.

GOLDTHWAITE, J., not sitting in this case.

SPECIFIC PERFORMANCE OF CONTRACTS BY COURTS OF EQUITY: See for a full discussion of this subject the notes to *Seymour v. Delancey*, 15 Am. Dec. 299 *et seq.*; *Anderson v. Green*, 23 Id. 423; *Atwood v. Cobb*, 26 Id. 661. See *Saltmarsh v. Beene*, *ante*, 525

RICHARDSON v. RICHARDSON.

[4 PORTER, 467.]

ADULTERY NEED NOT BE PROVED BY DIRECT TESTIMONY, but it may be inferred from circumstances that lead to it by fair inferences, as a necessary conclusion.

ADMISSION OR CONFESSION of a defendant in his answer can not establish adultery or authorize a decree of divorce upon that ground, either in cases of divorce *a vinculo* or *a mensa et thoro*.

DESERTION ON THE PART OF PLAINTIFF IS NO DEFENSE to an action of divorce upon the ground of adultery.

COSTS WILL NOT BE AWARDED against a wife in a divorce suit brought by her although she is unsuccessful.

COURT OF EQUITY, ON A BILL FOR A DIVORCE by the wife, will direct the husband to pay over to a *prochein ami* sufficient funds to prosecute the suit to a final hearing.

ALIMONY WILL ALSO BE AWARDED the wife *pendente lite*.

ERROR to a decree of the circuit court of Washington county, exercising chancery jurisdiction, dismissing a bill of the complainant for a divorce, at her cost. The facts appear from the opinion.

Sallee, for the plaintiff in error.

Gibbons, *contra*.

GOLDTHWAITE, J. The suit was instituted in the circuit court of Washington county, in January, 1834, and is a bill in equity,

by means of which, the complainant seeks to procure the dissolution of a marriage, contracted between the defendant and herself, in the year 1810.

The complainant alleges, in terms well calculated to excite the sympathies, that she has borne to the defendant eight children, all living pledges of her affection to him, whom she charges to have treated her, at all times, with coldness and neglect, and frequently with personal chastisement, brutal insult, and unmanly abuse. She further charges him to have formed an adulterous connection, about the year 1829, with one Charlotte Richardson, a common prostitute, whom he brought to the dwelling of the complainant, built for her a house, but a short distance therefrom, and has ever since lived with her in adultery. She also charges, that she entertained serious apprehensions for her life, from his cruelty—he having declared in the most solemn manner, that he would take her life, but for the fear of the law; compelled by this cause, she sought refuge with her mother, on whose kindness and bounty she had subsisted for the last four years, previous to the exhibition of her bill.

She alleged, moreover, that two of her children are daughters grown up to woman's estate, whom the defendant, regardless of the duties and feelings of a parent, had reduced to the degraded state of servants and slaves to his paramour, compelling them to perform the most menial offices to that prostitute: that the other children remaining with him, are in a state of almost entire nakedness, destitute of the soothing attentions of a mother, and daily witnesses of the disgraceful, immoral, and adulterous conduct of their father.

The bill also sets forth, a statement of the personal estate held by the defendant, and alleges that nearly the whole of the same was obtained by reason of his marriage with the complainant. She prays that the marriage may be dissolved, the property divided as may be just and equitable, that the custody of the children may be committed to her, and for general relief.

The answer is in a tone of sufficient asperity, to show the state of feeling between the parties to have been of a most unpleasing description. The complainant is charged to have been exceedingly lazy, indolent, and taking no care of the family; with permitting everything to be wasted, neglected, and destroyed; with being petulant, passionate, and oftentimes sullen and stubborn, at times exhibiting the greatest passion and fury, and then remaining silent for weeks. The defendant admits that

he has more than once inflicted personal chastisement on his wife, by whipping her with small peach or plum-tree switches, and once by striking her with his open hand; but this he excuses by reason of being provoked thereto, by her excessive abuse, taunting and provoking language, combined with her insufferable neglect. In relation to the particular and specific cause of offense, set forth in the bill, the defendant alleges, "that at the time his wife left his house, and for more than a year subsequent thereto, he never had been guilty of an act of infidelity to his wife, in connection with Charlotte Richardson, and that she did not remove into the house, near the dwelling of the defendant, until more than a year subsequent to the time his wife left his bed and board." The answer denies in general terms, any cruel treatment, and insists that the defendant has conducted himself to his children, as a kind and affectionate father; that he neither permits them to see nor learn anything which is improper, and that they are all well satisfied with their condition in life, and desire no change.

It must appear to all, that if the facts as they are charged, actually exist, there could be but little difficulty in establishing the same by evidence, which would be perfectly satisfactory in its character; but that disclosed by the record, produces no such conclusion; the examination of the witnesses was evidently conducted by those unskilled in the art, or not aware of the importance of presenting facts for the consideration of the court, and although enough is disclosed to induce the belief that the witnesses knew more, and could perhaps have stated facts, which, if disclosed, might have established the material allegations of the bill, yet it would be highly dangerous, as well as manifestly illegal, for any court to act on facts which might, but which have not, been established by testimony. It has been urged with great force, that the same measure of testimony should not be required to establish the crime of adultery, against him who is shown to entertain a feeling of disgust and dislike to his wife, as against one whose daily intercourse is of the most friendly and harmonious description; but it can not be said that the mere existence of such feelings will authorize a court to infer the commission of such an offense, without some evidence within the established rules.

It is said, however, that the proof brings the defendant within the rules of evidence applicable to cases of this character—that the fact is not necessary to be established by direct evidence, but may be inferred from other facts—that if a married man

is seen at a brothel, and remains there a sufficient time, in a room with a common prostitute, to commit the act, adultery shall be inferred: *Asley v. Asley*, 1 Hag. 714. The general rule is laid down with more clearness and brevity in the case of *Loveden v. Loveden*, 2 Id. 1: "It is a fundamental rule, that it is not necessary to prove the direct fact of adultery. The fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion." Now the only facts proved in this case, seem to be that Charlotte Richardson was a widow, living on the public road in the country, and that the defendant had been seen to call there for a few minutes in passing the road.

It is said that here is a married man, going into a brothel, etc.—but no evidence is shown in the record to establish any fact which can legally induce the conclusion that this female was then a prostitute. The subsequent facts proved are, that she was removed in 1829 or 1830, to a house near the defendant, by a slave belonging to him; that she has since had two bastard children, of which he is the reputed father, and that he has been seen at her house.

The witnesses state that they know nothing of their own knowledge, but from circumstances, they should think that the defendant and Charlotte Richardson had been living, or might have been living in adultery since about 1829. It is also proved that he paid for a loom which was put up in her house. If we test these facts by the rule before referred to, can we arrive at the conclusion of adultery committed?

The reputation of the paternity of the children, is certainly not the legal way to establish it, nor can it weigh—neither can we infer what the circumstances are, which the witnesses do not state. Does the paying for the loom, the moving of the woman by the slave or by his master, the proximity of residence, the being seen at her house, no circumstances of suspicion being stated, or the bearing of bastard children by her, with the reputation of Richardson's being their father, bring this case within the general rule before stated? We look in vain for any fact which, by fair inference, will lead to adultery as a necessary conclusion.

Before dismissing the consideration of the evidence in this cause, it may not be improper to advert to the general rules which are understood to prevail in the ecclesiastical courts on the subject of allegation. It is believed to be the uniform practice of these courts, to require that all the facts should be alleged with such convenient certainty, of time, person, and

place, as will enable the defendant to meet the charge with proof. How far the adoption of similar rules may be necessary or expedient in this state, is one point on which the court will not now express any opinion.

But it is said that no evidence was necessary in this cause—that the material fact of adultery is admitted by the answer, and that a decree must be the consequence—that the statute directing that the confessing or admission shall be received, was only to prevent collusion, and ought not to apply to cases where no collusion exists, and where none can be apprehended.

All the various statutes on the subject of divorce, seem to have copied very closely from the rules which have obtained in the ecclesiastical courts of England, and perhaps the exposition which has been given to these rules, will be found to afford good, if not the best rules of construction, for our statutes. That confessions, shall not by themselves, be admitted to establish the fact of adultery, is a well-settled rule of those courts, and is one of the established canons of the English church, adopted in the year 1603—and the unvarying decisions of the courts of doctors commons have applied it to all cases of divorce, whether final or temporary. Some doubt seems to have existed, whether the most solemn confession, without some fact proved, leading to act, would of itself justify the husband in withdrawing from the bed of the wife: *Mortimer v. Mortimer*, 2 Hag. 310; 4 Ecc. 47, and cases there cited. This case is believed to settle the construction which the canon of the church has received—indeed, it would be impossible to say how far any rule, which should attempt to attach facts to a confession, would be of any real service: for, if the confession would not be received by itself, it is difficult to conceive how any fact, not conclusive in itself, would aid it. Be this as it may, our statute has not left the discretion to any court, to receive aid from a confession. It is found, Aik. Dig. 131, “In order to prevent collusion between the parties, in no case, shall the confession of them, or either of them, be taken or received as evidence, in any case of divorce.”

It was a subject of some doubt with the court, whether the object of the legislature being apparent, to prevent collusion, and there being no danger, or not such great danger of this, in cases where the divorce was not a *vinculo*, a court would not be authorized to decree a divorce *a mensa et thoro*, on a confession merely; but such a practice seems never to have obtained in the English ecclesiastical courts, under a canon certainly not so obligatory in its terms as our statute, which applies to all

cases of divorce, whether final, or otherwise. A similar rule obtains in New York: 1 Johns. Ch. 197.

We have, therefore, been reluctantly drawn to the conclusion, that the admission or confession of the adultery in the answer, would not authorize the court to decree, without proof of the fact, in the ordinary method, provided for, by the rules of law—and our regret is the greater, because, in the case before us, the answer seems very distinctly to admit the crime charged; but to rest its excuse on what is termed by the ecclesiastical courts, *compensatio criminis*, setting up the desertion of the wife from his house, in 1829, as a bar to her relief. If such was admitted, it would not bar the relief. Even a malicious desertion will not bar a sentence of divorce, for adultery: *Sullivan v. Sullivan*, 2 Ecc. 314.

The charge of cruelty is the only one remaining to be considered; and without examining the mode of its allegation, either as general or particular, so as to enable the defendant to answer or disprove the fact, it is sufficient to observe, that on this point, there is a total defect of testimony.

The court below dismissed the bill at the costs of the complainant, and it does not appear, in any part of the record, that she prosecuted her cause by a *prochein ami*, who would, alone, be responsible for costs. It was manifestly improper to render any decree against her, for costs, in a suit prosecuted against her husband, under any circumstances; but, in this case, the court is of opinion, that he should have been compelled by the decree, to pay the same, as, from the admissions of the answer, it appears that she had probable cause for instituting her proceedings; although she may not have been able to prosecute the case to successful issue. He would also have been directed, in the earliest stage of the proceedings, to pay over to her *prochein ami*, a sufficient sum of money to prosecute the suit to a final hearing; and she should have been alimented *pendente lite*—as the husband would thus have been responsible for the costs, there would have been neither hardship nor impropriety, in decreeing the same against him, independent of the admissions of the answer. It might also have been proper, for the court below, under peculiar circumstances, to have dismissed the bill, but without prejudice, though such a decree is understood to be matter of discretion with the court—and which exercise of discretion could not be reviewed. But as this question has not been argued, no opinion is necessary on this point—the more especially as, from the facts charged by the bill, and disclosed

by the answer, it is not improbable, that the causes which induced the exhibition of the complaint, may have continued since the suit was instituted.

It is the opinion of this court, that there is no error in the decree, so far as it directs the bill to be dismissed; and that there is error in the same, so far as it directs the dismissal, at the costs of the complainant—for which error it is reversed; and this court, proceeding to render such decree as should have been rendered by the court below, doth order, adjudge, and decree, that the said bill of complaint be dismissed, and that the said John Richardson, the defendant therein, shall pay all the costs of this court, and of the court below.

ADMISSIONS AS EVIDENCE.—“Concessions are voluntary acknowledgments made by a party of the existence or truth of certain facts.” Bouv. Law Dict., tit. Admissions. One of the principal exceptions to the general rule of evidence rejecting hearsay testimony is that which allows admissions and confessions made by a party against his interests to be received as evidence in judicial proceedings. Mr. Greenleaf considers such evidence admissible “as a substitute for the ordinary and legal proof, either in virtue of the direct consent and waiver of the party, as in case of explicit and solemn admissions; or on the grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.” 1 Greenl. Ev., 13th ed., sec. 169. So, many admissions of third persons are admissible, partly as belonging to the *res gestæ*, partly as made against the interest of the party making them, and partly because of some privity with him against whom they are offered in evidence: *Id.* When made under such circumstances as render them admissible in evidence, they are considered the safest and best proof that can be adduced: *Matchin v. Matchin*, 6 Pa. St. 332, 333, *per* Gibson, C. J.; *Williams v. Williams*, 1 Law Rep. (Proc. & Div.) 29; *Robinson v. Robinson*, 1 Sw. & Tr. 394; 29 L. J. (P. M. & A.) 179; *Stone v. Stone*, 4 Notes of Cases, 286. “The admission of a party charged with a criminal or wrongful act has, at all times and in all systems of jurisprudence, been considered as most cogent and conclusive proof:” *Per* Cockburn, C. J., in *Robinson v. Robinson*, *supra*. “A species of evidence of the highest kind, provided always that it is accompanied with certain requisites: first, undoubted proof that the admissions were made; second, that the expressions were clear and distinct; and third, that the admissions were sincere:” *Per* Dr. Lushington, in *Stone v. Stone*, *supra*.

ADMISSIONS OF PARTIES TO DIVORCE SUIT.—The consideration of this subject necessarily requires us to examine the nature of a suit of this kind in order that we may ascertain who are parties thereto; who will be affected by granting the relief sought; and when, if at all, the law allows the marital relation to be dissolved upon the admission or confession of one of the parties of the commission of such acts as under the law constitute a ground for divorce; and also whether such admissions must be corroborated by other evidence before a court will be justified in granting the relief sought. Marriage, although generally defined to be a personal relation arising out of a civil contract to which the consent of the parties capable of making it is necessary, can not, like other contracts, be

dissolved by the parties at will. Divorce is allowed only for causes approved by law. An agreement which has for its object a dissolution of the marital relation is inoperative and of no legal effect. Neither can courts properly act upon the consent of the parties, and, because of such consent, grant either party a release from the matrimonial compact. A suit for divorce, although on the face of the record a mere controversy between two private parties, is, in truth, a triangular proceeding, *sui generis*, in which the public or government occupies the position of a third party: 2 Bish. Mar. & Div., 6th ed., sec. 230; Opinion of Judges, 16 Me. 481; *Whittington v. Whittington*, 2 Dev. & B. Law, 64. In South Carolina, marriage is defined to be "a civil contract of mutual partnership and personal cohabitation during life, under the provisions of laws passed on this subject. The parties are the man, the woman, and the state. The state is interested, her interest being that the contract shall be fulfilled beneficially to the progeny, of whom the future citizens are to be composed." McCord's South Carolina Statutes, vol. 2, p. 733. Thus, it will be perceived that, although not a party to the record, the public is interested in all suits for divorce, not for the purpose of opposing the divorce at all events, but to prevent a dissolution of the matrimonial ties, except as justified by facts which the law has declared to be sufficient ground for such dissolution. So, in seeking such relief, it becomes necessary to establish the justice of the application, "not merely as between the parties to the record, but as between them and the community, including those individuals who are specially interested, yet not before the court:" 2 Bish. Mar. & Div., 6th ed., sec. 231. This is what is frequently termed "satisfying the conscience of the court:" *Id.*; *Hall v. Hall*, 3 Sw. & Tr. 347; *Wolf v. Wolf*, Wright, 243. Mr. Bishop, after considering this subject at length, thus states his conclusions as to the nature of such a suit. "We may, therefore, regard the divorce suit as a civil one, between three parties—the government, the plaintiff of record, and the defendant of record. What the government does is: 1. To protect the rights of persons not before the court, but liable to be affected by the decree or sentence; 2. To guard the interest of the public as to its morals; and, 3 and chiefly, to see that the status of its subjects, who are parties of record, and sometimes their children, is properly determined or established. But it has no interest, which it desires to enforce, to compel the plaintiff of record either to bring the suit or to prosecute it when brought; and so he may discontinue it, or bar his right, at pleasure. It is a civil, triangular action of tort, in its whole character *sui generis*."

From these observations it will be perceived that inasmuch as the public constitute a third party to every divorce suit, it must necessarily follow as a logical and legal deduction, based on the rules of evidence, that no decree or sentence of divorce, separation, or nullity, can be founded on the sole evidence of the admissions or confessions of the defendant, either in or out of court. Such confessions, or admissions, are not evidence against the party public, and consequently a decree in the plaintiff's favor, without other evidence, would be unwarranted. Such has always been the rule of the common law: 2 Bish. Mar. & Div., 6th ed., sec. 240; *Baker v. Baker*, 13 Cal. 87. A similar rule prevails in the canon law founded on a decretal epistle of Pope Celestine III., and renewed in the canons of 1597. For the definition of "canons" as used in this note, see 1 Bish. Mar. & Div., 6th ed., sec. 51. In England this has always been the law, at least since 1603, founded on the one hundred and fifth canon of that date, unless some change has been made therein by the act of parliament, dated August 28, 1857, 20 and 21 Vict., c. 85, which deprived the English ecclesiastical courts from and after its going

into operation in 1858, of their jurisdiction over matrimonial causes, and transferred them to a new court, styled: "The court for divorce and matrimonial causes." Whether any such change was made by that act will be considered hereafter, the present remarks being made with the understanding that from 1603 the English courts have been governed by the one hundred and fifth canon, which is in the following words: "Forasmuch as matrimonial causes have been reckoned and reputed among the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required, upon any suggestion or pretext whatsoever, to be dissolved or annulled, we do strictly charge and enjoin, that, in all proceedings in divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out of the depositions of witnesses, and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, however taken under oath, either within or without the court." Poynter on Marriage and Divorce, 338. Mr. Bishop considers this canon, both in spirit and effect, and probably in letter, a part of the common law: 2 Bish. Mar. & Div., 6th ed., sec. 241.

The courts of this country have generally so regarded it, and have uniformly proceeded in conformity with its mandate: *Woolfolk v. Woolfolk*, 53 Ga. 661; *Scott v. Scott*, 17 Ind. 309; *Succession of Weigel*, 18 La. Ann. 49; *Baxter v. Baxter*, 1 Mass. 346; *Holland v. Holland*, 2 Id. 154; *True v. True*, 6 Minn. 658; *Washburn v. Washburn*, 5 N. H. 195; *White v. White*, 45 Id. 121; *Montgomery v. Montgomery*, 3 Barb. Ch. 132; *Lyon v. Lyon*, 62 Barb. 138; *Betts v. Betts*, 1 Johns. Ch. 197; *Devanbagh v. Devanbagh*, 5 Paige, 534; S. C., 28 Am. Dec. 443; *Wood v. Wood*, 2 Brews. 447; *Welch v. Welch*, 16 Ark. 527; *Haves v. Haves*, 33 Ill. 286; *Robinson v. Robinson*, 16 Mich. 79; *Latham v. Latham*, 30 Gratt. 307. So also in England, the courts have considered themselves bound by the one hundred and fifth canon, and have uniformly refused to allow persons to be divorced upon admissions alone, uncorroborated by circumstances or other evidence: *Tucker v. Tucker*, 5 Notes of Cases, 458; *Harrison v. Harrison*, 5 Moore P. C. 96; *Noverre v. Noverre*, 1 Rob. Ecc. 428, 440; *Williams v. Williams*, 1 Hag. Con. 299; 4 Eng. Ecc. 415. Section 48 of the act above referred to, establishing the present English divorce court, provided that "the rules of evidence observed in the superior courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the court." In *Robinson v. Robinson*, 1 Sw. & Tr. 362, a case which was tried before the court established by that act, the question, what weight should be given to admissions made by the defendant, and whether a divorce could be granted on them alone, was considered and determined by the court. "Now the evidence, as has been before observed, consists entirely of admissions made by the wife alone; and here a question presents itself, as to how far the admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce. If this court had been a court of purely ecclesiastical jurisdiction, the one hundred and fifth canon, which prohibits the granting of a divorce on the sole and unsupported testimony of the wife, would have precluded us from acting on this evidence. But as this court is not a court of ecclesiastical jurisdiction, nor bound in cases of divorce *a vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to

exception, of admissions of adultery by the principal respondent, it would be the duty of the court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife, unsupported by corroborative proof, should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the court to proceed with the utmost caution in giving effect to statements of this kind; the more so as it must always be borne in mind that the co-respondent, though not in a legal point of view interested in the result, inasmuch as from the absence of evidence available as against him, he is entitled to an acquittal, has yet, socially and morally, the deepest interest in the result. Nevertheless, if, after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the court ought to act upon such evidence, and afford to the injured party the redress sought for. The admission of a party, charged with a criminal or wrongful act, has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present."

In rendering this decision the English court apparently overlooked the fact, that the one hundred and fifth canon was simply declaratory of the ancient common law, by which the court was governed by the express provision of the act organizing it: See sec. 48 above cited. The admissions of the wife in that case, however, were held not to amount to a confession of adultery, and consequently the above remarks can not be considered as binding in subsequent cases; and Mr. Bishop correctly regards them as mere *dicta*: 2 Bish. Mar. & Div., 6th ed., sec. 246. But in *Williams v. Williams*, L. R., 1 Prob. & Div. 29, decided in 1865, Lord Penzance thus refers to *Robinson v. Robinson*: "The case cited is an authority for the proposition, that the court may act on the admissions of the wife, although they are not supported by any other evidence. But I entirely concur with the observations of the lord chief justice as to the great danger of relying entirely upon such admissions. In each case the question will be, whether all reasonable ground for suspicion is removed."

ADMISSIONS OR CONFESSIONS OF PARTIES ADMISSIBLE.—Although the policy of the law prohibits a decree of divorce from being granted upon the admissions or confessions of the parties alone, they are not, for that reason, inadmissible in evidence where they have been voluntarily made, and are relevant; free from suspicion of collusion and corroborated by circumstances, they are ranked with the safest proof: *Matchin v. Matchin*, 6 Pa. St. 332, 337; *Mortimer v. Mortimer*, 2 Hag. Con. 310; 4 Eng. Ecc. 543. Great caution should be observed by courts however in receiving such testimony, and if it appears not to have been voluntarily made, or to have been obtained by fraud, it should not be received: *Derby v. Derby*, 6 C. E. Green, 36; *Callender v. Callender*, 53 How. Pr. 364. In the latter case it was held by the supreme court of New York that where a husband, by fraud and duress, obtains from his wife a written confession of adultery and commences a divorce suit upon that ground, equity will enjoin him from using the confession in the suit.

On the other hand, if it appears to the court that what is testified to does really amount to a confession which has been made voluntarily and without collusion, it should be received: *Stone v. Stone*, 3 Notes of Cases, 278, 286; *Tucker v. Tucker*, 5 Id. 458; *Harris v. Harris*, 2 Hag. Ecc. 160; 4 Eng. Ecc. 160; *Williams v. Williams*, 1 Hag. Con. 299; 4 Eng. Ecc. 415; *Robinson v. Robinson*, 1 Sw. & Tr. 362; *Williams v. Williams*, L. R., 1 Prob. & Div. 29; *Garrett v. Garrett*, 12 Ind. 407; *Baker v. Baker*, 13 Cal. 87; *Evans v. Evans*, 41 Id. 103. The weight to be given to such confessions, when properly received, varies according to the circumstances of each particular case. When connected with other facts, a confession or admission may be entitled to the highest consideration, while in other cases it may be treated as of no significance: 2 Bish. Mar. & Div., 6th ed., sec. 243; *Jones v. Jones*, 2 C. E. Green. 351; *Fullerton v. Fullerton*, 11 Scotch Less. Cas., 3d series, 720; *Cross v. Cross*, 3 Paige Ch. 139; *Cobbe v. Garston*, Milw. Ir. 529; *Brealy v. Reed*, 2 Curt. Ecc. 833, 843; 7 Eng. Ecc. 328, 330.

The chief reason why courts ought not to act upon uncorroborated admissions is, that if they did so act, it would be impossible to prevent collusion between the parties, and the obtaining of divorces where the grounds for them do not exist. The rule must be interpreted by its reason: 2 Bish. Mar. & Div., 6th ed., sec. 244. Some difference of opinion exists in England, whether the evidence which must accompany and corroborate the confession of a party before a divorce can be decreed, need only be such as to satisfy the court of the absence of collusion, or whether there must always be other testimony directly pointing to the fact confessed. In a number of cases the sufficiency of the former is distinctly implied. In *Harrison v. Harrison*, 4 Moore P. C. 96, 103, the corroborating evidence showed only that the confession was sincere, and that there had been no collusion. So in *Noverre v. Noverre*, 1 Rob. Ecc. 423, the corroborating evidence disclosed extreme, though not indecent familiarities on the part of the wife with a pupil of her husband, and it was held sufficient. Also in *Tucker v. Tucker*, 5 Notes of Cases, 458, a divorce was decreed on account of adultery, at the suit of the husband, on the confession of the wife, aided by supplemental evidence not in itself amounting to proof of adultery: See also *Owen v. Owen*, 4 Hag. Ecc. 261; *Mortimer v. Mortimer*, 2 Hag. Con. 310; 4 Eng. Ecc. 543; *Grant v. Grant*, 2 Curt. Ecc. 16; 7 Eng. Ecc. 3. In this country it is sufficient if the proof shows that the confessions are free from collusion or fraud and have been voluntarily made: *Billings v. Billings*, 11 Pick. 461; *Jones v. Jones*, 2 C. E. Green, 351; *Baker v. Baker*, 13 Cal. 87; *Evans v. Evans*, 41 Id. 103; *Sawyer v. Sawyer*, Walk. (Mich.) 48. But see *Harman v. McLeland*, 16 La. 26; *Clutch v. Clutch*, Sax. 474; *Hansley v. Hansley*, 10 Ired. 506. In *Sawyer v. Sawyer*, *supra*, the amount of evidence required to corroborate a confession was held to vary with the danger of collusion. So in *Baker v. Baker*, 13 Cal. 95, it was said, that "if the confessions of the party were to be received as sufficient proof there would be danger of collusion. It is to guard against this that other proof is required in corroboration of the defendant's confessions. The same rule must apply to confessions as evidence in all other cases of divorce from the bonds of matrimony, with this limitation: that where there is less danger of collusion, or it could not be practiced so easily, the corroborating facts or circumstances need not be of so decisive a character. The object of the rule is to guard against collusion—not to obstruct the administration of justice. Where the circumstances of the cases are such as to repel all suspicion of collusion and leave in the mind of the court no doubt of the truth of the confessions, it should act accordingly.

STATUTES MODIFYING COMMON LAW RULE.—In some of the states the rule of the common law as above stated has been modified or changed by statute, and in other states statutes have been adopted which exclude all confessions: *Jordan v. Jordan*, 17 Ala. 466; *Gray v. Gray*, 15 Id. 779; *Cornelius v. Cornelius*, 31 Id. 479; *Simons v. Simons*, 13 Tex. 468; *Mathews v. Mathews*, 41 Id. 331; *Brainard v. Brainard*, Wright, 354. In the construction of a statute which prohibited confessions from being received, the supreme court of Ohio, in *Bascom v. Bascom*, Id. 633, said: "The statute, with a view to prevent divorces by collusion, prohibits the receipt of the admissions or confessions of either party in evidence. But when it becomes necessary to show any transaction of either party, the conversation *bona fide* had, has been uniformly regarded as part of it, and admissible; the court being careful to exclude everything that could, by the most strict construction, be looked upon as originating in collusion, or the desire of either party to make evidence to favor the application of the other party." In California, a statute forbids a divorce, "upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties," etc.: Civ. Code, sec. 130. See *Baker v. Baker*, 13 Cal. 87; *Evans v. Evans*, 41 Id. 103; *Matthai v. Matthai*, 49 Id. 91.

CHILDRESS v. McCULLOUGH AND RICHARDSON.

[5 PORTER, 54.]

MISJOINDER OF PARTIES.—Courts of law will not take cognizance of distinct and separate claims or liabilities of several persons in one action, though standing in the same relative situations. Hence, where two persons have covenanted with another, by distinct and separate writings, the one for the performance of several duties and the other becoming surety for him, they can not be joined in the same action to recover for a breach.

COVENANT. Error to the circuit court of Tuscaloosa county. On a general demurrer to the declaration, judgment was rendered for the defendants. The facts are stated in the opinion.

Crabb and Porter, for the plaintiff in error.

Ellis and Peck, contra.

GOLDTHWAITE, J. This action, in its form, is covenant; and the declaration sets forth a contract under seal, dated twenty-ninth January, 1833, entered into by the plaintiff, with the defendant, McCullough, by which it appears, that McCullough covenanted to perform several duties, and make several payments, which it is unnecessary to recapitulate, but which were to be performed and paid at several times during the years 1833 and 1834. It also sets forth another contract under seal, between the same parties, dated the twentieth September, 1833, which does not seem to change the previous contract, except so far as to discharge McCullough from one of his stipulations. It also sets forth a contract, under seal,

between the plaintiff, and the defendant, Richardson, dated September, 1833; by which Richardson covenanted with the plaintiff to become the security of McCullough for the performance of his part of the contract, before entered into by him with the plaintiff—so far as the same extended to the then present year. Many omissions of the duties to have been performed by McCullough, under his contract, are assigned for breaches of the covenant, and it avers omissions of acts to be done by him in 1834 as well as 1833. To this declaration the defendants demurred, and judgment was thereon rendered in their favor. The correctness of this judgment is now sought to be reversed.

The objection to which this declaration seems liable, is the misjoinder of the parties defendant. It is a well-recognized rule, that courts of law will not take cognizance of distinct and separate claims, or liabilities of several persons in one suit, though standing in the same relative situations: 1 Chit. Pl. 33.

In the present case, McCullough and Richardson were each liable to the plaintiff, on their several covenants, but by different instruments, and not to the same extent. McCullough was liable absolutely; Richardson was only liable in the event of the failure of McCullough. McCullough was liable for two years, Richardson for one only. And although the contract of each was in relation to the same subject-matter, it would by no means follow, that they are liable as joint contractors. There is no more reason, to assume a joint liability in this case, than in the case of the maker and indorser of a promissory note. Then the contract of each party is in reference to the same subject-matter, yet the liabilities are perfectly distinct and several in their character.

That the defendants were not liable as joint contractors, and should not have been sued as such, is, we think, obvious; but one illustration may be drawn from a well-settled and acknowledged principle of law. All joint contractors are liable in the same manner, as each other, and a release of one is the release of all: Co. Lit. 232; L. M. S. 376. Test the case by this rule, and it would follow, if the defendants are joint contractors, that McCullough would be released, if a release was given to Richardson. That this would not be the effect of a release to him, under the case presented, is without doubt.

There was therefore no error in the judgment of the court below, and it must be affirmed.

COLLIER, J., not sitting.

SANDERS AND HARRISON v. OCHILTREE.

[5 PORTER, 73.]

A NOTE DRAWN ON SATURDAY, payable one day after date, becomes due on the Monday following, if no days of grace are allowed. Action can not be commenced on the day of the date of the note, on the ground that the day following is Sunday.

WHERE, HOWEVER, A NOTE FALLS DUE ON A SUNDAY subsequent to the next day after its date, the day of payment is the day previous to that agreed upon by the parties for performance.

ASSUMPSIT upon a note dated Saturday, September 13, 1834, payable one day after date. The writ was tested September 15, 1834. The defendant pleaded in abatement that the writ was issued before the cause of action accrued, and upon issue joined upon such plea, verdict was rendered for defendant. The other facts are stated in the opinion.

Peck, for the defendant in error.

HOPKINS, C. J. The question presented by the assignment of error in this case is, whether a note for the payment of money which was executed on a Saturday, and payable one day after date, was due on the day of its date, or on the next Monday afterward. The note is not one upon which days of grace are allowed. Neither party intended that the money should be paid on the day the note was made. The promise made by one party and accepted by the other, was to be performed the next day, and that day was a Sunday, on which it was not lawful to comply with the promise, or to accept the fulfillment of it. To decide that the money was due on the day of the date of the note, would be to allow an effect to the contract against the clear intention of the parties.

We are of opinion, therefore, that the day for performance, was the first one after that of the date of the note, upon which the money could have been paid, without a violation of the intention of the parties, or of the law of the land. That day was the next Monday after the date of the note.

In the case of *Avery v. Stewart*, 2 Conn. 69 [7 Am. Dec. 240], a majority of the court determined that a note, payable within sixty days from the date, was due on the sixty-first day after the date of the note, because the sixtieth day was a Sunday. We concur in the opinion of the minority of the court in that case.

Where a contract is to be performed within or at a stipulated

time, or a specified number of days after date, and the day fixed for performance is not the next day after the date and happens to be a Sunday, the contract ought to be performed the day before. This qualification of the rule, applied to this case, contains the principle applicable to negotiable instruments, and by the admission of it, the operation of the law will be uniform. When the last of the three days of grace, allowed on negotiable instruments, is one on which it is unlawful to demand or make a payment, the day for performance is the second day of grace. Where there is any lawful day for performance, contracts ought to be performed within the time limited. As the action in this case was commenced on the day the note was due, it was brought before the cause of action accrued.

The judgment is affirmed.

WHEN THE DAY FOR THE PERFORMANCE of a contract or other act happens on Sunday, some difference of opinion exists as to whether it shall be performed on the day previous or the day after. The preponderance of authority seems to be that it shall be performed upon the day after. In the note to *Avery v. Stewart*, 7 Am. Dec. 250, the authorities are collected and reviewed. A demand of performance on Sunday need not be complied with: *Delameter v. Miller*, 13 Id. 512.

WHITE, ADMINISTRATOR DE BONIS NON, v. BEARD.

[5 PORTER, 94.]

PERSONAL REPRESENTATIVE of a testator or intestate has no interest in the real estate of the deceased, and no power to sell it, unless authorized to do so by an order of the proper court made in exercise of the jurisdiction conferred by statute.

RIGHT OF SUCH REPRESENTATIVE TO RECOVER the purchase money agreed to be paid the deceased for the conveyance of a tract of land, where there has been a part performance by the delivery of possession, is founded upon the agreement which shows that the deceased intended to convert his interest in the land into personal property, and also because, there having been a part performance and no subsequent default, a specific execution of the agreement may be had.

ADMINISTRATOR WHO HAS AGREED BY PAROL TO CONVEY to another a tract of land when the purchase money is all paid, may sue and recover any installment thereof that may be due, without having made or tendered a conveyance of the title, the vendee being in possession.

PAROL AGREEMENT FOR THE SALE OF REAL ESTATE, no part of which has been performed, can not be enforced by either party, nor by their representatives after they are dead.

WHERE A. SOLD LANDS BY PAROL, and the vendee went into possession, and, after the vendor's death, executed his note to the administrator of the vendor for the purchase price, and took the administrator's bond for

title, conditioned for the making of title when the note was paid, in an action by B., administrator *de bonis non* of A., to recover the amount of the note: *Held*, 1. That the vendee's possession having been undisturbed, the note given by him was founded upon a sufficient consideration, and might be enforced. 2. That the administrator *de bonis non* was the proper party to sue the vendee.

ASSUMPSIT brought by Abel H. White, administrator *de bonis non* of Benjamin Palmer, on a promissory note for nine hundred dollars, payable to Job Going, administrator of Benjamin Palmer. Judgment for defendant. The other facts appear from the opinion.

Crabb, Stewart, and Porter, for the plaintiff in error.

Ellis and Peck, contra.

HOPKINS, C. J. In this case, the action is founded upon a note made by the defendant to Job Going, as administrator of Benjamin Palmer, deceased. On the trial of the cause, the defendant gave in evidence a penal bond, executed by the said Going, on the day of the date of the note, with a condition, that the bond should be void, if Going conveyed a good title in fee simple to the land described in the condition, to the defendant, when he made full payment of the purchase money to Going.

It is recited in the condition, that Palmer, the intestate, purchased the land in his life-time, of Going; that afterward, he bargained and sold it to the defendant, and delivered the possession to him. That in pursuance of the agreement between the intestate and the defendant, the latter had made his notes for the purchase money to Going, as administrator; one payable the first of March, 1831, and the other the first of March, 1834. It was proved by a witness, that the note in this case, which was due on the first of March, 1834, was given for a part of the purchase money, and is one of the two notes mentioned in the condition of the bond. It was proved by the same witness, that the parties to the bond, admitted, when it was executed, the defendant had no title to the land, and no agreement in writing for it with Palmer, who had taken in his life-time, the bond of Going for a title. The land is particularly described in the condition of the bond. After the death of Going, the plaintiff was appointed administrator *de bonis non* of the goods and chattels of Palmer, and brought this action to recover the sum of money due on the note.

Upon the foregoing evidence, the court below instructed the jury, that if they believed the facts proved, the consideration

of the note had failed, and the defendant was entitled to their verdict. The assignments of error here are made upon the plaintiff's exception to the instructions, and the admission of the bond in evidence.

It is indisputable that a personal representative has no interest in the real estate of his testator or intestate, and no power to sell it, unless authorized to do so, by an order of the proper court, made in the exercise of jurisdiction conferred by our statute law. No such order appears in this case. The first question to be considered is, whether the intestate did any act in his life-time, which shows that he intended his interest in the land should form part of his personal property? The proofs of the defendant are his own admissions and Going's, contained in the condition of the bond, or proved by the witness. Such evidence would be incompetent against the heirs of Palmer, upon an application of either the administrator or the defendant, to a court of equity, for a specific execution of the agreement between the defendant and Palmer, but the evidence is competent between the parties to this suit. According to the proof in the cause, Palmer, the intestate, sold the land described in the condition of the bond, by a parol agreement, to the defendant, who was put in possession of the premises by the vendor; that in pursuance of the agreement with the intestate, he made the note in this case, and another for the purchase money, to Going, the administrator of the vendor. It does not appear that the defendant has ever been disturbed in the possession of the land, or that he has abandoned it. If the evidence be true, and it can not be questioned in this case, and the intestate had lived until the purchase money became due, without having disturbed the defendant's possession, he would have had a right to a specific execution of the agreement in a court of equity: 2 Story Eq. 66, 82, 83, 87; Rob. on Frauds, 148; Sug. Ven. 104, 105.

His right to an execution of the contract, would be founded upon the performance by him, of a valuable part of the agreement, and the impossibility of placing him *in statu quo* by any other relief. The part that he performed, was the delivery of the possession, upon which the defendant could have made a successful application for a specific execution, if the vendor or his heirs had refused to convey according to the agreement, and the defendant had been in no default for not performing his part of it. The estate of the intestate could not be placed in *statu quo*, if the execution of the contract should be refused. The defendant has, we presume, as the contrary does not appear,

enjoyed the possession of the premises for many years, and as he entered upon them on a contract for the purchase, no rent could be recovered: 1 Stew. & P. 294; 6 Johns. 46; 2 Taunt. 145.

As the intestate sold the land in his life-time, delivered the possession, and died, in no default for not having performed the residue of his contract, it is a case in which his administrator has the right in equity, to the purchase money, and to a remedy in a court of equity, to compel the heirs of his intestate—if the case can be proved as clearly against them, as it is between the parties here—to perform the agreement, and the defendant to accept the performance of it. The right of the administrator to the purchase money, is founded upon the contract of the intestate, which shows he intended to convert his interest in the land, into personal property, and having performed so much of the contract as to acquire a right, had he lived, and been in no default afterward, to a specific execution. The right of the administrator to the remedy in equity, is the consequence of his equitable right to the purchase money: Rob. on Frauds, 144; 3 Atk. 1; 2 Story Eq. 96-99; *Hays et al. v. Hall et al.*, in this court [*ante*, 530].

If the heirs refuse to convey the land, the same principle which sustains applications of heirs to a court of equity, to compel personal representatives to pay the purchase money of real estate, which had been purchased by testators or intestates, supports the claim of the administrator against the heirs, to a decree for a specific performance.

Neither the administrator, nor the heirs of Palmer, have been required by the agreement, to do any act since his death. The condition of the bond describes the land, and it is admitted in the condition, that the notes were given for the purchase money, in pursuance of the agreement between the intestate and the defendant. The effect of this admission is, that [if] the notes were made payable at the times it was agreed between the parties to the contract, the different installments of the purchase money should be paid. As he did not stipulate in the bond of Going, for a conveyance of the title, until the purchase money should be wholly paid, we must presume that he was not entitled, according to his agreement with the intestate, to such a conveyance, before the payment of all the money. No other inference can be drawn from the admissions of the parties, than that the possession of the land was delivered by the intestate, and received by the defendant, in part performance of the agreement. The effect of the admissions in the condition of the bond, made by Going, and accepted by the defendant, is the

same against the defendant, as if he also had executed the bond; and these admissions show all the terms of a complete parol contract.

The defendant can have no right to a conveyance of the title, until he pays the whole purchase money, and while his possession is undisturbed, the administrator is in no default for not causing the title to be conveyed to him. ~~None~~ One part of the purchase money was payable before the day agreed upon for conveying the title, an action at law can be maintained for each installment, without having made or tendered a conveyance of the title: 3 Stew. 361.

This case is not like one, where an intestate or testator had made a parol agreement for the sale of real estate, no part of which was so performed in his life-time as to give him an equitable right to the execution of the agreement. In such a case, the intestate had no right to an action at law, and was without any remedy in equity, and his administrator would have no such right or remedy. Here the intestate performed such a part of the agreement as would entitle him, if he were alive, to the execution of it. But the right to a specific performance is equitable in its character; and we incline to the opinion, but do not decide, that if the intestate, in his life-time, had taken the note in this case, upon no other consideration than the parol agreement, and the part performance of it, a recovery upon the note might be prevented. Our statute of frauds prohibits the maintenance of an action on such an agreement. If an action for the purchase money were brought upon a parol agreement, the action could not be maintained. Where a note for the purchase money had been made, but the agreement remained in parol, and no part of it performed, these facts, if proved, would show the note to be without consideration. Where such an agreement has been partly performed, by the delivery of the possession of the land to the vendee, who continued to enjoy it, we do not know it has ever been decided, that the vendor's equitable right, acquired by the part performance, is a legal consideration, for a note for the purchase money, given after such performance: 7 Johns. 205; 15 Id. 503; Com. on Con. 314; 2 Stark. 277; 12 Johns. 451. But the note, in this case, is supported by a legal consideration in the obligation of Going, who bound himself individually to convey the title to the defendant. The defendant, who was in the possession of the land, had a right to obtain, upon a sufficient consideration, a stipulation for the title from any person who was competent to contract.

As to the question which was argued at the bar, of the right of the plaintiff to maintain the action, we think it clearly appears the note was given for a debt, that was equitably owing from the defendant to the administrator of the intestate, and that the administrator took it in his representative character. If another person than Going had incurred the obligation, which supplies the note with a legal consideration, to induce the defendant to give the administrator notes for the purchase money, and they had been made payable to him, the right to actions upon them, after the death of the administrator, would be the administrator's *de bonis non* of the intestate, to whose personal estate they equitably belonged, and to whose administrator in his representative character they were made payable. Between such a case, and the one here, we perceive no difference.

As the note was payable to Going, as administrator, it was not essential to the right of the plaintiff to the action, that it should appear in the declaration, from the time the note had to run after its date, that it was taken upon the sale of such property, as a personal representative may be authorized by an order of a court, to sell at public auction, upon the credit prescribed by law in such cases. There are many cases in which a personal representative may lawfully take notes for demands existing in favor of the intestate at the time of his death. The evidence shows the note was made for money equitably owing to Going, in his character of administrator of Palmer, payable to the administrator and left uncollected by him. We are therefore of opinion, the action upon the note can be maintained by the administrator *de bonis non*: Ala. 206; 2 Stew. 133. We think the court below erred in admitting the evidence, and in giving the instructions, which were excepted to.

The judgment is reversed, and the cause remanded.

COLLIER, J., not sitting.

LYNES v. STATE.

[5 PORTER, 236.]

WRIT OF ERROR IS AN ORIGINAL WRIT issuing out of a court of chancery, in the nature as well of a certiorari to remove a record from an inferior to a superior court as of a commission to the judges of such superior court to examine the record and to affirm or reverse it.

SUCH WRIT DOES NOT OWE ITS ORIGIN TO STATUTE, but it is a common law

writ, and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit in a court of record.

WHERE THE LEGISLATURE HAS OMITTED to prescribe the manner in which the constitutional power of the supreme court is to be exercised over subordinate jurisdictions in criminal cases, resort to such writs as are known to the law will be had in bringing such cases before it for revision.

SUPREME COURT HAS THE POWER, in the exercise of its criminal jurisdiction, to bring before it criminal cases by writ of error.

MISNOMER of either the Christian or surname is good cause for a plea in abatement.

WHERE AN INDICTMENT CHARGED A PERSON BY THE NAME of George Lyons, and his true name was George Lynes, a plea in abatement was held good.

WRIT of error to the circuit court of Madison. The facts are stated in the opinion.

McClung, for the plaintiff in error.

John D. Phelan, attorney-general, contra.

COLLIER, J. This court, at its last term, on the application of the plaintiff in error, awarded a writ of error to the circuit court of Madison, directing the clerk of that court to send up a full and complete transcript of the record of his indictment and conviction at the suit of the state, for playing "at a game of cards in a public-house," etc., which record is here regularly returned, with the writ of error.

As the present is the first case of a criminal prosecution ever brought here by process, from this court, it may not be out of place, briefly to state the reasons on which we place our right to revise the judgments of the circuit court in such cases, by writs of error. By the first section of the fifth article of the constitution of Alabama, it is declared that the judicial power of the state shall be vested in one supreme court; circuit courts to be holden in each county in the state, and such inferior courts of law and equity, not to consist of more than five members, as the general assembly may, from time to time, direct, ordain, and establish. By the second section of the same article, the supreme court is vested with appellate jurisdiction only, coextensive with the state, under such restrictions and regulations as, from time to time, may be prescribed by law: provided, that it shall have power to issue writs of injunction, mandamus, *quo warranto*, *habeas corpus*, and such other remedial writs as may be necessary to give it a general superintendence and control over inferior jurisdictions.

The constitution clearly invests this court with the right of supervision, over the judgments of subordinate jurisdictions;

but the legislature have omitted to prescribe the mode, by which judgments in criminal cases shall be brought up for revision, leaving undefined the "restrictions and regulations," contemplated by the constitution in this particular.

The proviso to the second section gives the right to issue such remedial and original writs as may be necessary to give efficiency to the constitutional powers of this court. We have no power to frame writs for this purpose, but must adopt such as are known to the law. Let us, then, inquire, whether the writ of error is of common law origin, and what is its office.

In Co. Lit. 288 b, and in 2 Bac. Abr. 187, a writ of error is said to be an original writ, issuing out of the court of chancery, in the nature as well of a certiorari to remove a record from an inferior into a superior court, as of a commission to the judges of such superior court, to examine the record, and to affirm or reverse it, according to law; and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit in a court of record. This writ does not owe its origin to a statute. Its uses have been in some instances directed by the legislature, and as a remedial process, it has in some cases been extended. Its name indicates its true purpose. And in the case of *The Queen v. Paty*, 2 Salk. 504, it was held to be grantable in all cases *ex debito justitiæ*, except in treason and felony: See further to the same effect, a very elaborate note to 2 Saund. 100, n. 1. In treason and felony it was necessary to obtain the king's consent, before the writ could issue: *Yates v. People*, 6 Johns. 337.

In England, the king is esteemed as the fountain of justice, and the supreme magistrate of the kingdom, intrusted with the whole executive power of the law. No court whatsoever, within the kingdom or its dependencies, can claim any jurisdiction, unless it some way or other, derive it from the crown: 2 Bac. Abr. 96. The judges are his representatives, and derive their powers from him.

Now in this country, the chief executive magistrate of the state, possesses no judicial powers. Such as are compatible with our form of government, and which were exercised by the king in England, by our constitution have devolved upon the judiciary. The writ of error, being a common law writ, and necessary to the exercise of the constitutional powers of this court, we consider our right to issue it unquestionable. How far the legislature may trammel this right by "restrictions and regu-

lations," is an inquiry which need not be made. It is enough for us, that these have not yet been enacted.

To examine the case as presented, the only error relied on, which we deem it necessary to consider, is that which brings to our view, the judgment of the circuit court, sustaining the demurrer for the defendant in error, to the plea in abatement of the plaintiff. This plea asserts that the plaintiff's name is George Lynes, and not George Lyons, as he is charged in the indictment. The demurrer admits the truth of the plea, and the only question to be determined, is whether the matter of it be fatal to the indictment.

Hawkins, 2 P. C. 317, lays it down, that a defendant can not take advantage of a mistaken surname in the indictment, though he may of a mistaken Christian name, though the surname by which he is described, hath no affinity with his true one, and he was never known by it. Lord Chief Justice Hale, Id. 175, 176, states the law as Hawkins does, and refers to some very old authors, the correctness of which he questions, and remarks that it is always safest to allow the plea of misnomer, both as to the surname and Christian name. It is difficult to discover why the distinction between the one name and the other should ever have been introduced—it must have been upon some refinement of reasoning, which has become antiquated and obsolete.

Modern decisions make no distinction between a misnomer of the surname and christian name. In either case, if it be substantial, it is good cause for an abatement of the proceedings. The usual criterion by which it is determined, whether there should be an issue to the jury upon the plea, is to inquire if the name disclosed in the plea, has the same sound with that set out in the indictment. If it has, the plea does not contain abatable matter. Let us try the plea by this test: Lynes is a name of but one syllable, while Lyons is a name of two, and conveys to the ear, sounds quite dissimilar. McCann for McCarn was held to be a fatal variance in *Tunnet's case*, Russ. & R. 351. So Shakespeare for Shakespear, in *Shakespear's case*, 10 East, 83; Tarbart for Tabart, was held bad in *Bingham v. Dickie*, 5 Taunt. 14.¹ The attorney-general has referred us to a note in Roscoe's Crim. Ev. 80, where it is stated that Harris was alleged in the indictment instead of Harrison, the true name, though he was sometimes called by the former. And the supreme court of Tennessee, in the case of the *State v. France*, 1 Overt. 434, held that there was no variance. We

have not the report of that case before us, but if it were examined, we think it would be found to be a case of larceny, in which property charged to have been stolen, was alleged to be the property of Harris—that his true name was Harrison, though he was sometimes known by the former name—that there was no plea in abatement, and that the rule of *idem sonans*, had no influence upon the decision.

Our opinions are, that the demurrer to the plea should have been overruled.

The judgment is therefore reversed.

WRIT OF ERROR.—As to who must join in, see *Wells v. Wells*, 16 Am. Dec. 150. No person can prosecute a writ of error to reverse a judgment who is not a party or privy to the record, or prejudiced by the judgment: *Marr v. Hauga*, 23 Id. 449. The practice on writs of error is considered in the note to *Campbell v. Stakes*, 19 Id. 568.

GOODLET v. SMITHSON.

[5 PORTER, 245.]

IN SALES OF LAND BY THE UNITED STATES, the law gives the right, and the patent is considered, not the title itself, but the evidence by which it is shown that the prerequisites to a legal sale have been complied with.

PURCHASER OF LAND FROM THE UNITED STATES, by the act of entry and payment of the purchase money, acquires an inchoate legal title, which may be alienated or divested in the same manner as any other legal title.

PRIOR TO THE ISSUANCE OF A PATENT, the interest of one in lands purchased of the United States, and for which he has received a certificate of final payment, may be levied upon and sold under execution.

TRESPASS, to try title. Verdict for defendant. The facts are stated in the opinion.

Thornton, for the plaintiff in error.

P. Parsons, *contra*.

GOLDTHWAITE, J. Goodlet instituted this action of trespass, to try titles against Smithson, and sought thereby to recover the possession of the tract of land described in the declaration.

From the bill of exceptions, taken on the trial of the case, in the circuit court, it appears, that Goodlet claimed title under a sheriff's deed. The execution by virtue of which the tract of land, which is the subject of controversy, was sold, was regularly issued on a judgment obtained against Smithson; and evidence was offered to prove that he had entered the land, made

full payment, and received a certificate for it in due course of law, from the receiver of public moneys, for the proper land district. On this evidence, the court instructed the jury, that previous to the issuance of a patent to Smithson, he had no such estate in the land, as could be levied on and sold by virtue of an execution, issued on a judgment at law. Goodlet, having failed in his suit, now prosecutes his writ of error to reverse the judgment rendered against him, and here assigns, that the circuit court erred in giving the instructions, before stated, to the jury. It is not contended that anything has been omitted, either by the purchaser of the land, or by the officers of the government, which by law is required to be performed, to make the act of purchase complete; but it is insisted that previous to the time when a patent actually issues, the title derived by the act of purchase, is merely equitable, and the purchaser is invested with no legal estate, and consequently, under our statute, his right can only be divested by means of a suit in chancery.

In the ordinary case of contracts between individuals, relating to the sale of lands, the title of the seller does not pass to the purchaser, except a conveyance in the form prescribed by law be actually executed, previous to which, the interest of the purchaser is a mere equity; but this is because the title to land can pass alone by reason of some one of the common assurances, or conveyances, which are known to the law. In the case of sales made by the United States, the law gives the right, and the patent may be considered, not as the title itself, but as the evidence by which it is shown that the prerequisites to a legal sale have been complied with. The acts of congress are silent in respect to the time when the purchaser of the public lands may enter and enjoy the full and exclusive dominion of his purchase; but it is evidently contemplated by all the legislation on the subject, that the act of purchase transfers an immediate right of possession to the purchaser, and he may at once enter on the land, if in fact the possession be, as it is always presumed to be, vacant, or if otherwise, the title thus acquired is sufficient to enable him to oust any intruder by due course of law.

Previous to the act of the twenty-fourth April, 1820, the sales of the public lands were usually made on a credit, and the purchaser was not entitled to receive a patent until the period of credit had expired, and he had made the entire payment for the land; but his right to the possession was complete with the act of entry, of which the certificate then required to be issued

was the legal evidence; and on this, without the aid of legislative enactment, he could maintain an action at law against and recover the land from any one in possession, under a weaker title than himself. When by the act of congress referred to, the credit on sales was abolished, no change was made in the right acquired by the purchase, nor could the patent issue to the purchaser, without some delay, but the certificate which was required to be given to him was, as before, evidence that the purchase was complete. He had performed every act which the law required from him, when he entered the land and paid the purchase money: all which was to follow, as to issuing of the final and complete evidence of right in the form of a patent, was to be performed by the ministerial officers of the government; but their omission could not, in any manner, change or affect his title; and although the patent would only be evidence from its date, yet if it became necessary, from any cause whatever, to show the inception of the legal title for the act of entry, it could be shown by the production of the certificate required to be given, and the title would be referred back to its source.

We arrive then, at the conclusion, that by the act of entry, and payment of the purchase money, the purchaser of land from the United States acquires an inchoate legal title, which may be aliened, descend, or be divested, in the same manner as any other legal title; and this view of the case is amply sustained by authority.

In Pennsylvania, it has been repeatedly held, that the payment of the purchase money, and a survey, though unaccompanied by patent, gives a legal right of entry: *Sims v. Irvine*, 3 Dall. 457; *Penn v. Klyne*, 1 Wash. C. C. 207; *Copley v. Biddle*, 2 Id. 354; and this rule derives additional force in its application to this case, as in that state, an equitable title will not authorize a recovery in ejectment: *Vanhorn v. Chesnut*, Id. 160; *Carson v. Boudinot*, Id. 33. In Kentucky, in the case of *Thomas v. Marshall*, Hardin, 19, it was held that an entry or survey of lands, was an inchoate legal title, which would descend and might be aliened; and vested such a legal right as might be sold under an execution.

In this court, in the case *Bullock v. Wilson*, 2 Port. 437, it was decided, that a certificate of final payment was evidence of a legal title, on which an ejectment could be maintained. The case of *Masters v. Eastis*, 3 Id. 368, can not be considered as at variance with the principle decided by the court, in the case of *Bullock v. Wilson*. It is true, in that case, it was held

that the grantee of the United States must succeed against the assignee of a certificate which had previously been held by the grantee, and which he had assigned to him; but it is not stated in what manner the assignment was made; most probably, however, by mere indorsement, which could pass no title, for the court directly and explicitly recognize the principle, that if a conveyance had been made by deed, the title of the grantee, by the patent, would have inured to the defendant in that action.

How far a patent and a certificate of final payment for the same tract of land, might conflict with each other, when issued to different persons, is a question not now raised, and therefore it need not be considered; but it is conceived no difficulty could arise in such a case, if the rule recognized by this court, in the case of *Masters v. Eastis*, were to be applied.

The circuit court having erred in giving the charge before stated to the jury trying the case, the judgment rendered must be reversed, and the case remanded.

STATE v. MAYOR AND ALDERMEN OF MOBILE.

[5 PORTER, 279.]

STREETS OF AN INCORPORATED TOWN are its highways, subject, in general, to such improvement and alterations as its legislative authority may prescribe, due regard being had to individual interests, and an equivalent being rendered for the sacrifice of private property.

POWERS OF A CORPORATION are to be ascertained by a reference to grants made by the legislature in its favor. It can have no rights except such as are specially granted, or as are incidental or necessary to give effect to the powers thus granted.

MUNICIPAL CORPORATION has no authority to appropriate streets or to narrow or widen them, unless vested with such power expressly by its charter, or as an incident to an express delegation of power.

ANY OBSTRUCTION IN A STREET or highway which tends to annoy persons living upon or near it, or which renders it more difficult of passage, and increases the danger of injury to person or property from collision of carriages or other causes, is a nuisance.

AT COMMON LAW, WHERE THE PARTICULAR CHARGE is the obstruction of a highway, the question of nuisance or no nuisance depends upon the fact whether its passage is rendered less commodious.

ERECTING A MARKET-HOUSE in the center of a street or highway of a city, by a city corporation, which interferes with a commodious passage through such street, is a nuisance.

EQUITY HAS JURISDICTION, in case of a nuisance, to restrain the exercise or the erection of, and in some cases to abate, that from which irreparable damage to individuals or great public injury will ensue.

JURISDICTION OF COURTS OF EQUITY in affording preventive relief, in cases of public nuisances, is undoubted where the fact of nuisance is placed beyond question; but if it be questionable, the relief is usually withheld.

WHERE THE FACT OF NUISANCE IS QUESTIONABLE, equity sometimes affords relief, by way of injunction, until a trial at law, if its denial would produce great public inconvenience.

PRINCIPLES UPON WHICH EQUITY ENTERTAINS AN INFORMATION to restrain the exercise of a public nuisance or to abate it, are: 1. To prevent irreparable injury before a court of law could act definitively. 2. To prevent a protracted and expensive litigation where there are many persons to defend.

WRIT of error to the circuit court of Mobile county, exercising chancery jurisdiction. The court dismissed the bill, on the ground that it had no jurisdiction. The facts are stated in the opinion.

Stewart and Thornton, for the state.

Sallee, contra.

COLLIER, J. The solicitor of the first circuit, in behalf of the plaintiff in error, filed an information in equity, in the circuit court of Mobile, in which it is alleged that Government street, in that city, was a public highway previous to the first day of January, 1821, subject to be used by all persons as such; yet the same has been greatly obstructed, by the erection of several large houses therein; and that private property on that street has been greatly injured and depreciated in value by such erections. It is further alleged, that the defendants have adopted measures with the view to the erection of another extensive market-house in Government street, which will still further hinder and obstruct its free and uninterrupted passage.

These allegations are sustained by several affidavits, which make part of the record. The information prays that an injunction may issue, to restrain the erection of the market-house, threatened and intended to be built. And upon a notice to show cause, why this prayer should not be granted, counsel appeared before the circuit court: when, upon full argument, the injunction was denied, and the information dismissed. To reverse which decree, a writ of error has been sued out, returnable to this court.

In the written arguments with which we have been furnished, this case is supposed to depend mainly upon these questions: 1. Do the facts, stated in the information, show a nuisance, either committed or intended? 2. Has equity jurisdiction over the subject, so as to afford a remedy?

1. By the act of 1820, entitled "An act supplementary to the act, entitled an act to incorporate the city of Mobile," among other things, it is enacted, "that the said corporation shall have power to widen, extend, and regulate the streets, lanes,, and alleys, within the limits of said city, provided, that no street lane, or alley, now existing, shall be widened, or extended, so as to infringe upon, or interfere with, any dwelling-houses, or other house, in the occupancy of any inhabitant of said city, without the consent of the owner or claimant thereof. And provided, moreover, that the street called and known by the name of Government street, shall, and the same is hereby declared to be, one hundred feet wide; and it shall be the duty of the said corporation, to designate, and distinctly to mark out, the northern limits of said street, according as the same were established by the Spanish government, as nearly as can be ascertained by the Spanish records, by the records of the land office, or by any other evidence, which they may deem satisfactory; and the limits, when so ascertained, marked out, and designated, shall be the permanent, northern boundary of said street." Here an authority is given to the corporation, to regulate the streets, etc., of the city, which authority is restricted, by an inhibition, that they shall not be so "widened or extended, as to infringe upon, or interfere with, any dwelling-houses, or other house," etc., "without the consent of the owner," etc. By the second proviso, Government street is declared to be one hundred feet wide, etc., and this is equivalent to a declaration, that it shall remain open of that width, notwithstanding any act to be done by the corporation.

Though all powers which are essential to the internal police of the city, are granted by the act of incorporation, and the acts supplementary thereto, the legislature have, in the second proviso, declared a standing veto, to any act of the corporate authorities, proposing to trench upon the prescribed limits of Government street. If the corporation were to authorize the owners of property on either side of this street, so to improve it, as to diminish the width of the street, no one would question, but that a power had been exercised which was inhibited by the legislature. And is authority less violated by erecting houses in the center of a street? In the one case, it would be an unusual, and therefore more striking violation, promising no public benefit as an equivalent. In the other, the erection of a market-house, in a public street, though certainly a great annoyance to those living contiguous, or having occasion to

pass it frequently, is not so palpable a breach of authority, because it is more usual, and offers in return, the semblance, at least, of public convenience. In either case, it would be an obstruction, which the corporation could not legalize, unless it were permitted to exercise powers, expressly withheld, by the source from which it derived its functions.

The streets of an incorporated town are its highways, subject, in general, to such improvement and alterations, as its legislative authority may prescribe; in which a due regard is to be had to individual interests: and sometimes an equivalent rendered for the sacrifice of private property. The extent of the powers of a corporation is to be ascertained by a reference to grants, which the legislature have made in its favor, for, as an artificial person, it can have no rights, except such as are specially granted, or those which are incidental and necessary to give effect to the powers thus granted: *The People v. Utica Insurance Company*, 15 Johns. 358 [8 Am. Dec. 243].

An act of incorporation is an enabling act—it imparts to the corporate body, all the power it possesses: *Head & Armory v. The Providence Insurance Company*, 2 Cranch, 168. And if the right to appropriate streets, to narrow or widen them, is not given, either by express delegation, or as an incident, by the legislature, it can not exercise the power.

In the case before us, the corporation (as we have seen) is vested with power to regulate the streets, etc., of the city, under certain restrictions, one of which is, that Government street shall be one hundred feet wide. The legislature have withheld the right from the corporation to regulate that street in disregard of this restriction; any act then done by the corporate body, which contracts its limits, must be invalid, as an usurpation of authority. The information charges, that the erections already made, greatly obstruct and stop up Government street, so that it can not be used as a highway by persons on foot, on horseback, with carriages, etc., as they had been accustomed, and were authorized to use it. And a diagram accompanying the record (if it can be considered a part of it), shows the width of that street at different points, and the length and width of the market-houses erected, from all which it appears, that the surface uncovered at several points was considerably less than one hundred feet, adding together the open space on either side of the erections. We incline to the opinion (though it can not be necessary to decide the question here), that the street should present an unobstructed open surface of

one hundred feet in width, and that it is not enough that the space on both sides of an obstruction should be as much as one hundred feet.

While the streets of a town are its highways, they may also be the public highways of the country. And in the present case, the legislative declaration, prescribing the dimensions of a street, excludes the action of the corporate body so far as it comes in conflict with the paramount will of the legislature, and must, in itself, be taken to make it a highway, free to the passage of all persons, for all legitimate purposes.

In regard to the first question, it remains but to inquire, whether the obstruction made, as well as that contemplated and intended by the defendants, does or would amount to a nuisance.

Russell, in his treatise on crimes, vol. 1, p. 295, says, nuisance "signifies anything that worketh inconvenience." And Bacon defines a common nuisance to be an offense against the public, either by doing a thing, which tends to the annoyance of all persons, or by neglecting to do a thing which the common good requires. If we were to take these definitions for our guide, we should have no difficulty in determining that the obstruction made and intended, comes up to the idea of the offense, in a city so populous and so commercial as Mobile. Do they not tend to the annoyance of persons living near them? And by narrowing a street, render more difficult its passage, and increase the danger of injury to persons or property, from collision of carriages and other causes? But we need not deduce our conclusions from general definitions. Bacon, in treating of nuisances in highways, 3 Bac. Abr. 97, remarks that "it is clearly agreed to be a nuisance to dig a ditch or make a hedge overthwart the highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act, which will render it less commodious." And further, "that it is no excuse for him, who lays logs in the highway, that he laid them only here and there, so that the people might have a passage through them, by windings and turnings:" *Reg. v. Watson*, 2 Lord Raym. 856; 2 Russ. on Crimes, 461. Thus we learn, that at common law, where the particular charge is the obstruction of a highway, the question of nuisance or no nuisance, depends upon the fact, whether its passage is rendered "less commodious." So that we discover in the case before us, the erection made, and that intended, are, and would be a nuisance. This view being decisive, we are relieved from considering whether the act of the legislature does not from implication,

make it a nuisance, to make any erections in the street, though the convenience of passing it may not be interfered with thereby.

2. Touching the jurisdiction of equity in cases of nuisance, though the cases in which it is exercised are not frequent, yet we think it undoubted. It is founded on the right to restrain the exercise, or the erection of that, from which irreparable damages to individuals or great public injury would ensue. Speaking upon this subject, Mr. Justice Story remarks: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth:" 2 Story Com. 201.

In cases of public nuisances, properly so called, an indictment lies to abate them, and to inflict other punishment upon the offenders. But in England, it was competent also, for the attorney-general to file an information in equity, to redress the grievance. The instances in which that court has lent its aid, are chiefly confined to informations seeking preventive relief, to inhibit the doing of some act, or performing some work, which when done, would amount to a public nuisance. In these cases the court proceeds by way of injunction: 2 Story Com. 201; 2 Mitf. Pl. 144; Eden on Inj. 157. Informations in equity have been maintained in some cases, where the object to be effected extended even to the abatement of a public nuisance. In such cases, the jurisdiction of the courts is predicated upon the ground of the ability of equity to give a more complete and perfect remedy, than is attainable at law, in order to prevent irreparable mischief, and also, to suppress oppressive and vexatious litigation. "In the first place, they can interpose, where the courts of law can not, to restrain and prevent such nuisances, threatened or in progress, as well as to abate those already existing. In the next place, by perpetual injunction, the remedy is made complete, through all future time. Whereas an information, or indictment, at the common law, can only dispose of the present nuisance; and for future acts new prosecutions must be brought. In the next place, the remedial justice may be prompt and immediate, before irreparable mischief is done; whereas at law, nothing can be done except after trial, and upon the award of judgment:" 2 Story Com. 203, 204.

In an anonymous case, reported in 3 Atk. 750, a motion was made for an injunction, to stay the building of a house, to inoculate for the small-pox; Lord Hardwicke, conceding the jurisdiction of equity (which was not questioned), remarks, that bills to restrain nuisances must extend to such as are nuisances

at law; and the fears of mankind, however reasonable, will not create a nuisance—but inasmuch as it had not been settled that such an erection created that offense, the injunction was denied.

In the case of the *Attorney-general v. Cleaver*, 18 Ves. 211, there was an information in equity filed against the defendant, praying an injunction to restrain him from manufacturing certain articles, and from the use of certain materials in the manufacture. Lord Eldon did not deny the jurisdiction of the court, but thought it proper to refuse the injunction until it could be ascertained by a trial at law, that the subject of complaint was a nuisance; and to be informed of this, took measures to expedite a trial upon indictment.

In *Crowder v. Tinkler*, 19 Ves. 617, the jurisdiction of equity by injunction, on the ground that property is likely to sustain irreparable injury, is conceded; and the lord chancellor considered the propriety of awarding the writ, to depend upon the question, whether upon all the affidavits, or the nature of the subject complained of, it was so clear that it constituted a nuisance, as to authorize the interposition of the court, without first putting the case in a course of trial at law. So in the case of the *Attorney-general v. Nichol*, 16 Id. 338, an information was filed at the relation of the Scottish hospital against Nichol, to enjoin the obstruction, and darkening of the ancient lights of the hospital; an injunction having been granted, its dissolution was afterwards moved before the lord chancellor, who thought that the jurisdiction of equity could not be disputed, notwithstanding the common law remedy, by action or indictment.

In the case of the *Attorney-general v. Utica Insurance Company*, 2 Johns. Ch. 371, an information in equity was exhibited against the defendant, charging the company with exercising banking powers and privileges, without authority therefor, and in derogation of law. The chancellor was of opinion, that the legal remedy, by information in nature of a *quo warranto*, was adequate to check the operations of the company, if they were unauthorized, and that that was a criminal proceeding. He further determined that the charge was an offense against the public, and could not be brought within the direct jurisdiction of chancery, which was intended to deal only in matters of civil right, vesting in equity; or where the remedy at law was not complete. That the process of injunction should be cautiously awarded, with great discretion, and only when necessity requires it.

The chancellor, after stating that the exercise of the banking power, charged in the information, does not produce such imminent and great mischief to the community, as to call for this summary remedy, remarks: "I know that the court is in the habit of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less preliminarily, by injunction, to put down a public nuisance, which did not violate the rights of property, but only contravened the general policy." These remarks were certainly uncalled for by the decision of the case, for it is there determined that the exercise of the banking power, if it be unlawful, is not a public nuisance. And to the same effect is the case of *The Attorney-general v. The Bank of Niagara*, 1 Hopk. Ch. 354. If the chancellor intended to be understood, according to the literal import of the terms he employs, either he is in error, or else the learned judges and authors whom we have cited, have mistaken the law, and with all deference for his judgment, we are disposed to think the former most probable.

The jurisdiction of courts of equity, in affording preventive relief, in cases of public nuisances, we understand to be clearly defensible, both upon authority and principle, where the fact of nuisance is placed beyond doubt: if this fact be questionable, the aid of that court is usually withheld; but even then it has sometimes been given by way of injunction (to continue until a trial at law), where its denial would be productive of great public inconvenience.

The principle upon which equity entertains an information to restrain the exercise of a public nuisance (as the employment of an offensive manufacturing establishment), or to abate it, has been already stated to be, in the first case, to prevent irreparable injury, before a court of law could act definitively, and in the second, to prevent a protracted and expensive litigation, which must generally be the case where there are many persons to defend. The information in the case at bar, is not as explicit as it should be, in disclosing the difficulties (if any exist) to adequate redress at law, so far as it regards the market-houses already erected; and though the proof may be ample, it will not be competent to give the relief sought in respect to those, unless the information be so amended as to present upon its face a good title to the aid of the court.

That the principles indicated by this opinion may be carried

out, the decree of the circuit court must be reversed, and the cause remanded. And an injunction is directed to issue from this court, according to the prayer of the information, returnable to the circuit court of Mobile, to continue until in the opinion of that court, the equity of the information shall be fully met and removed by the answer and proofs, to come in and be taken in the case. And the costs of this court must be paid by the defendants.

GOLDTHWAITE, J., not sitting.

INJUNCTION IN CASES OF NUISANCE: See *Bell v. Blount*, 15 Am. Dec. 526; *Society for E. U. M. v. M. C. & B. Co.*, 21 Id. 41, 51, note.

RIGHT OF PRIVATE PERSON TO ABATE A NUISANCE WITHOUT SUIT: *Gates v. Blincoe*, 26 Am. Dec. 443, note.

POWER OF MUNICIPAL CORPORATIONS TO ABATE NUISANCES AND TO DECLARE WHAT IS A NUISANCE: *Milne v. Davidson*, 16 Am. Dec. 194, note; *City of Baltimore v. Hughes*, 19 Id. 243; *Baker v. Boston*, 22 Id. 421; *Hart v. Mayor etc. of Albany*, 24 Id. 165.

OWEN v. WHITE.

[5 PORTER, 435.]

FATHER IS NOT BOUND BY THE CONTRACT OF HIS SON, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one.

WHERE THE CHILD CONTINUES UNDER THE DIRECTION and control of the father, it is left to the parent's discretion to determine what is necessary for him, unless it appears that there is a clear omission of parental duty in providing for the child's maintenance.

WHERE THERE HAS BEEN SUCH OMISSION, the law compels the father to pay for necessities furnished by a third person, upon the ground that a neglect of duty in this behalf implies an authority to bind the parent.

WHERE A FATHER ABANDONS HIS INFANT CHILD and forces him to leave his house, he is liable for a suitable maintenance; but where he voluntarily leaves his father's house, the authority of the father to purchase necessities is not implied.

JURY ARE TO DETERMINE whether the authority of a parent can be inferred from the facts.

WHERE NO EVIDENCE IS GIVEN from which an authority can be inferred, the court may instruct the jury that the case is not made out.

ERROR to the Franklin circuit court. The facts are stated in the opinion.

Ormond, for the plaintiff in error.

Nooe, contra.

COLLIER, J. This cause was commenced by summons, at the suit of the defendant in error, before a justice of the peace of Franklin county; where a judgment being rendered against him, he appealed to the circuit court of that county; and the case being submitted to a jury, there was a verdict and judgment against the plaintiff in error.

On the trial, a bill of exceptions was sealed by the judge who presided, as follows: "It was proved by the plaintiff, that the articles sued for were furnished to the son of the defendant, a youth about eighteen years of age, who was a pupil in a college in the town where the plaintiff lived; that the defendant lived about eighteen miles from the college. There was no proof of any authority from the father, to contract the account with the plaintiff; whereupon, the defendant moved the court to charge the jury, that under the proof in this case, the defendant was not liable, even for necessities; which instruction the court refused to give. To which refusal of the court, to charge as aforesaid, the defendant, by his counsel, excepted," etc.

A father is not bound by the contract of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one. So long as the child continues under the direction and control of the father, it is left to the discretion of the parent, to determine what is necessary for him; unless it appear that there is a clear omission of parental duty in providing for his maintenance. Where this is the case, the law subjects the father to the payment for necessities furnished by a third person, upon the ground, that his neglect to do that which natural, moral, and municipal laws have prescribed as a duty, implies an authority to bind the parent: 2 Kent Com. 162.

If a child leave his father's house to seek his fortune in the world, or avoid domestic discipline and restraint, or escape from justice, the authority of the father to purchase necessities is not implied. But if a father abandon his duty to his infant child, so that he is forced to leave his house, he is liable for a suitable maintenance. And the principle of the distinction is, that in one case the father is blameless, and in the other blamable: *Angel v. McLellan*, 16 Mass. 28 [8 Am. Dec. 118]. It is a question of fact, whether the authority of the parent can be inferred from the proof, and consequently addresses itself to the jury. But if no evidence is given from which an authority is inferable, and none is in fact insisted on, there can be no impropriety in the judge in instructing the jury that the case

is not made out. Such an instruction should, however, never be given where any testimony, though slight, is introduced.

In the case before us it is stated that "there was no proof of any authority from the father to contract the account with the plaintiff." Here there is an admission of record, that an indispensable link in the chain of the evidence was wanting; and it would have been no usurpation of power, on the part of the judge, to have charged the jury that the testimony did not entitle the defendant in error to a verdict, but a course of procedure entirely legal. In the written suggestions, which have been submitted to us by the defendant's counsel, it is said, that the instructions actually given were in conformity with what we have supposed the law to be. In reply it may be observed, that the bill of exceptions does not inform us what instructions were given, but only what was refused.

The charge asked for, considering the insufficiency of the proof, being proper, its refusal is an error; for which the judgment is reversed, and the cause remanded.

HOPKINS, C. J., not sitting.

OBLIGATION OF FATHER FOR SUPPORT OF CHILD: *Stanton v. Wilson's Ex'rs*, 3 Am. Dec. 255. A father is not liable to support a minor child who voluntarily leaves his home: *Angel v. McLellan*, 8 Id. 118.

BLAKENEY v. BLAKENEY.

[6 PORTER, 109.]

AT COMMON LAW NO ACTION COULD BE MAINTAINED BY AN EXECUTOR or administrator to recover damages for an injury done either to the person or property of his testator or intestate.

STATUTE 4 EDWARD III., c. 7, AUTHORIZES an executor to maintain trespass for an injury to the goods and chattels of a testator; and by 25 Edward III., c. 5, this remedy was extended to executors of executors; and by 31 Edward III., c. 11, to administrators.

CONSTRUING A STATUTE ACCORDING TO ITS EQUITY, is to give effect to it according to the intention of the law-makers as indicated by its terms and purposes.

A STATUTE MAY BE EXTENDED or restrained by an equitable construction, and a case out of the mischief intended to be remedied by a statute may be construed to be out of the purview, though it be within the words of the statute.

TITLE OF AN ACT MAY BE REFERRED TO for the purpose of ascertaining the intent of the legislature, when not clearly manifest in the body of the act. STATUTE OF 1826, Aik. Dig., 1st ed., 260, does not authorize the commence-

ment of an action *de novo*, by the personal representative of a deceased, for an injury done in the life-time of the latter.

ERROR to the circuit court of Wilcox county. The facts are stated in the opinion.

Peck, for the plaintiff in error.

Hopkins and Parsons, contra.

COLLIER, C. J. The plaintiff in error, as administratrix of Alfred Blakeney, deceased, brought an action of trespass *quare clausum fregit* against the defendant, in the circuit court of Wilcox. On her writ she indorsed, that the action was brought as well to recover damages as to try titles.

The declaration contains two counts: the first charges, in addition to the breach, entry, etc., of the close of the plaintiff's intestate, in his life-time, that the defendant kept possession thereof, for the space of twelve months, and hindered and prevented the intestate, for that space of time, from occupying the same. The second count only varies from the first in alleging the actual expulsion of the intestate, from the close broken and entered. The declaration concludes, to the damage of the intestate, in his life-time, and to the plaintiff, his administratrix. To each count the defendant demurred, and his demurrer being sustained, the plaintiff prosecutes a writ of error to this court. Several points have been made, at the argument, which we deem it unnecessary to consider, and will confine our inquiries to an examination of the question, whether the plaintiff is entitled to maintain the action she has brought.

It was a principle of the common law, that no action could be maintained, by an executor or administrator, to recover damages for an injury, done either to the person or property of his testator or intestate—the action died with the person—and this principle applied as well where the deceased was the aggressor, as where he was the party injured. This rule of *personalis actio moritur cum persona*, received considerable alteration by the statute of 4 Edw. III., c. 7, entitled *de bonis asportatis, in vita testatoris*, the preamble to which recites, that theretofore, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators, carried away in their life, so that such trespasses have remained unpunished, and enacts: "That the executor in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be, should have had, if they were living." The remedy given by this act

is further extended to executors of executors, by statute 25 Edw. III., c. 5, and to administrators by the statute 31 Id. 11.

The statute of 4 Edw. III. being remedial in its character, has always been liberally expounded in advancement of the object of the legislature; and though the word trespasses only is employed, it has been held to embrace other cases within the intention of the statute: *Emerson v. Emerson*, Sir W. Jones, 174;¹ *Berwick v. Andrews*, 2 Ld. Raym. 974. So by an equitable construction of the statute, it has been determined that the executor or administrator is not restricted in the form of action to be adopted, but may prosecute any, by which an injury to the personal estate of the testator, in his life-time (which lessens its value), may be redressed: Lat. 168; *Williams v. Carey*, 4 Mod. 403; 2 Bac. Abr. 445. And by the equity of the statute, an executor or administrator may have a *quare impedit*, for a disturbance in the time of his testator or intestate. So the personal representative of a termor may maintain ejectment, where the testator had a lease for years, or from year to year, whether the ouster was before or after the death: 1 Wms. Ex. 513; *Doe v. Porter*, 3 T. R. 13.

I have considered thus at length, the exposition of 4 Edw. III., not because of its direct influence upon the case at bar, but to ascertain whether, by analogy, a construction may be placed upon our statute, which authorizes the plaintiff to prosecute her suit. The act of our legislature, relied upon by the plaintiff, is in these words: "All actions of trespass *quare clausum fregit*, and actions of trespass to recover damages for injuries to personal property, may, if the plaintiff or plaintiffs die, be revived by his, her, or their representatives, in the same manner as actions on contracts:" Aik. Dig., 1st ed. 260. This act, though it changes the common law, is clearly remedial, and should receive a liberal interpretation—that is, should be extended beyond the literal import of its terms—if this be necessary to the effectuation of the end it contemplates, and to prevent a failure of the remedy it proposes. To determine the extent of its operation, we must ascertain its object. By its terms, it gives to executors and administrators the right to revive certain actions of trespass, and is entitled, "an act to provide for reviving actions of trespass:" Aik. Dig. 17, no. 16.

The object, then, to be effected, is the revival of actions brought by a testator or intestate, in the name of a personal representative, and not the commencement of an action *de novo*. Reasons may have influenced the legislature in giving a remedy, in the one case, which it was unwilling to extend, in the other.

1. Erroneous: See *Egerton v. Egerton*, W. Jones ~

In the former, the deceased had himself elected to seek redress, and should his suit abate by his death, his estate would be subjected to costs. In the latter, he had brought no action, and may have intended to waive the wrong. These considerations, it is possible, may have influenced the legislature, in thus limiting the remedy. Be this as it may, the construction contended for at the bar, can not be given to it, unless we go, not only ultra the strict letter, but contra the letter also—which is inhibited by every just principle of construction.

The statute of 4 Edw. III. never extended to executors of executors or administrators (though these perhaps were embraced by an enlarged equity), hence, the enactment of the statutes of 25 and 81 Edw. III. And our act, passed professedly to authorize the revival of actions, can not be held to give an authority to maintain an action originally; this would be, not to promote the intention of the legislature, but to go quite beyond it. The statute of the 4 Edw. III. was enacted to afford a remedy in favor of an executor, by an original action for a wrong done to the personal estate of the testator in his life-time, and it has been rightfully determined, that it authorized any action, by which the injury to the personal estate could be repaired, on the ground, that they came within the equity of the statute. To construe a statute according to its equity, is nothing more than to give effect to it, according to the intention of the law-makers, as indicated by its terms and purposes. Hence, it may either be extended or restrained, by an equitable construction; and it is held, that a case out of the mischief intended to be remedied by a statute, shall be construed to be out of the purview, though it be within the words of the statute: *Dwarr. on Stat.* 724, 9th vol. Law Lib. The intention of the act being so clearly manifested in its body, we scarcely deem it necessary to call in aid its title, which speaks with clearness its end. The title of a statute, we are aware, is an unsafe criterion by which to determine its meaning; yet, in cases where the intent is not plain, it may slightly assist in removing ambiguities.

To conclude—the case before us is one for which the legislature have failed to provide a remedy—perhaps designedly—but, whether this be so or not, we have no power to supply the omission; and, instead of extending the statute to embrace grievances not within its purview, we think it safer to say, in regard to such cases, with Mr. Justice Heath, “the legislature is always at hand;” and if it be thought wise to give the remedy, its powers are ample. We have considered this case, as it was

considered at the argument, an action to recover damages only: and, were it taken, as indicated by the indorsement on the writ, to be an action to try titles, the result would not be different. The personal representative of a termor, for an ouster in his own time, may have an action; but such is not the present.

Our conclusion is, the plaintiff is not entitled to an action, and the judgment is consequently affirmed.

SAMPSON AND LINDSAY v. GAZZAM.

[6 PORTER, 123.]

EVIDENCE OF USAGE or custom is admissible for the purpose of ascertaining the sense and understanding of parties by their contracts which are made with reference thereto.

SUCH USAGE OR CUSTOM becomes a part of the law of the contract, and rests on the same principles as the doctrine of the *lex loci*.

WHERE A CUSTOM OR USAGE IS PROVED to exist in relation to a particular trade or pursuit, if it be general, all persons engaged therein are presumed to contract with reference to it.

WHERE WORDS FROM USAGE OR CUSTOM are used in a sense by one class of the community different from their general acceptance among others not engaged in the same pursuit, courts will construe them in the sense in which they are used by such class.

EVIDENCE OF A USAGE OR CUSTOM is admissible to vary the common law liability of common carriers by water.

PAROL EVIDENCE IS ADMISSIBLE to show that the words "dangers of the river," in a bill of lading, are, by the usage and custom of merchants and others, understood to include other dangers than those arising from the element of water.

ERROR to the circuit court of Mobile. The facts are stated in the opinion.

Ellis and Peck, for the plaintiffs in error.

Hopkins, contra.

By Court, ORMOND, J. This is an action brought by the plaintiffs against the defendant, as a common carrier. The declaration is against him as a carrier, at common law. The questions which are made in the cause, arise out of a bill of exceptions, which was taken by the plaintiffs at the trial—the material parts of which are the following:

The bill of lading, signed by the plaintiffs, and used as evidence, was in these words: "Shipped in good order and well conditioned, by the plaintiffs, on board the steamboat Mobile,

whereof Young is master, now lying at Claiborne, and bound for Mobile, certain bales of cotton, marked, etc., to be delivered in the like good order and condition, at Mobile (the dangers of the river only excepted), unto the consignees, or assigns, paying, etc. In witness whereof," etc. The defendant proved that the fire originated in the hold of the boat; that the hold was entirely filled with cotton, at Montgomery, and the hatches then closed, two days before the fire occurred, and that no lights or fire had been introduced into the hold; that the fire was first seen bursting up perpendicularly through the deck, from the hold, and the flame then had the size and appearance of the flame of a candle; that it burst out thus, about four feet behind the ash-pans and furnaces; and that the space between the place where the fire burst out and the ash-pans and furnaces was sheathed with copper. The defendant further proved, that the cotton placed in the hold at Montgomery was taken in during a rain; and that the officers and crew did everything in their power to arrest the fire and save the boat and cargo.

The defendant then offered witnesses, to prove the meaning of the words inserted in the bill of lading, viz., "dangers of the river only excepted," when such bill of lading was given for goods shipped on board of a steamboat. This was objected to by the plaintiffs, but allowed by the court.

The plaintiffs then proved, that an accidental fire, by which the boat and cargo were destroyed, and which was not attributed to any want of diligence, care, skill, or integrity, on the part of those intrusted with the management of the boat, was, according to the general sense, practice, and understanding of the people of the state of Alabama, including merchants, planters, boat owners, and others, within the meaning of the exception in the bill of lading, to wit, "dangers of the river."

The plaintiffs requested the court to charge the jury, that steamboat owners were, in legal contemplation, common carriers, and were liable, as such, for the delivery of all articles shipped on board their boats, unless they were disabled from making such delivery by the act of God, a public enemy, or some other cause, naturally arising out of the element of water; and that the accidental destruction of the boat by fire, was not within the meaning of the exception, "dangers of the river," the latter part of which instructions the court refused to give; but charged the jury, that although steamboat owners were common carriers, and as such, could only be excused from the discharge of their trust, by the act of God or the public enemy,

that yet, they could enter into a special contract, varying their common law liability. And if they believed from the testimony, that they had entered into such a contract, in which they had protected themselves against the dangers of the river—and if they believed from the testimony, that according to the sense, practice, and understanding of merchants, planters, and others in the state of Alabama, by these words, was meant an accidental fire, not attributable, in any manner, to the want of care, intelligence, skill, and honesty, in those who had the control of the boat—they would find a verdict for the defendant, if this was such an accidental fire first before mentioned. But that the want of proper care, skill, and judgment, would not excuse the carrier, even though they should find that his special contract protected him, as above mentioned. To this charge of the court there was an exception. A verdict was found for the plaintiffs. The above charge of the court is now assigned for error.

This is a case of the highest importance. In a country where property to such a vast amount is annually transported to and from the sea-board by the agency of common carriers, the precise character of the stipulations entered into by the parties, and the rights and obligations thereby created, should be clearly ascertained and plainly defined. There is not, and indeed could not be, any controversy about the obligation which the common law imposes on a common carrier. If that rule is to be applied to the defendant, he is clearly liable for the value of the cotton; although there can not be any doubt, that the fire by which the cotton was consumed was not caused by the negligence or want of skill of the captain or crew of the boat on which the cotton was shipped—but was, in all probability, a case of spontaneous combustion.

The precise question here presented for the first time in this state, is, whether a carrier can be allowed to explain the meaning of the words, “dangers of the river,” in a bill of lading at the place where the contract is made. The natural import of the phrase would seem to refer to those accidents which are peculiar to the element of water: and the attempt, in this case, is to show, by parol proof, that the phrase in question is of much larger import, and was understood by the parties, to exempt the carrier from all losses, not attributable to his negligence, want of skill, or honesty.

As courts of justice sit to expound and enforce the contracts, which parties litigant before them have made,

it is the plain dictate of natural justice, that proof, showing what the contract is, should be allowed to be made if the evidence can be heard by the court, consistently with those rules which have been established for the ascertainment of truth. It is insisted, that the words "dangers of the river," in a bill of lading, have a plain, ascertained meaning, and that to permit it to be explained by parol proof, would, in effect, be to permit a written instrument to be varied by parol. If it be liable to this objection, it will be fatal to its admission—for, however great the injury might be, in this particular case, it would be better to submit to it, than to introduce into our system of jurisprudence a principle so fraught with mischief. It is true, that in general, when an ambiguity exists on the face of a written instrument, it is the province of the judge to explain it. But it frequently happens that the usage of trade, and the practice among merchants, is absolutely necessary to be known, to a proper understanding of their contracts. At first these usages and customs are proved, as evidence of the intention of the parties, and are at length, silently incorporated into the body of the law, and recognized by the courts.

It is a matter of no moment whether this is considered an exception to the general rule, or whether it is esteemed a resort to the proper authority for an authoritative exposition of the language used by the parties. Words are but the vehicles of thought, and if, by the usage and practice of one class of the community, words are used in a sense, different from their acceptance among others, not engaged in the same pursuit, it would be the height of injustice to interpret their language by a rule, not within their contemplation at the time of making the contract, and thereby subject one of the parties to the penalty of a contract he had never entered into.

That to permit proof to be made in similar cases, has long been considered as the settled law, both in England and the United States, an examination of a few leading cases will show. In *Ab. Sh. 254*, a case is cited, which happened in the reign of Charles I. To an action of covenant, on a charter party which contained an exception of the perils of the sea, the defendant pleaded that the ship was taken by hostile persons, armed in a warlike manner—and thereupon, the question, whether such a capture was within the exception, was brought before the court by a demurrer, in the most strict technical form. The court, however, took the opinion of several mer-

chants, by certificate in writing, and afterwards by examination in open court, upon the meaning of the words of this exception, as established by usage among them, and decided in conformity to such opinion.

The case of *Gordon v. Little*, 8 Serg. & R. 551 [11 Am. Dec. 632], is expressly in point with the one at bar. The suit was against a common carrier, for injury to goods intrusted to his care. The declaration contained a special count on the bill of lading, which contained an exception similar to the one under consideration, and a count against him as a carrier at common law. On error to the supreme court of Pennsylvania, Chief Justice Tilghman and Judge Duncan determined, that the words in the bill of lading ("unavoidable dangers of the river") might be explained by proof of a usage, to ascertain the construction of the contract. The same principle has been determined by the supreme court of the United States, in the case *Renner v. The Bank of Columbia*, 9 Wheat. 585. The case arose out of a custom of the banks in the District of Columbia, to make demand and give notice on the fourth day of grace.

As there is no difference in law between these conditions of a contract which the law implies, and those which are expressly stipulated, it might have been in that case, as in this, insisted, that proof of any usage or custom, different from that implied by law, was inadmissible. It was so insisted; but the court held, that on proof of the usage, the action could be maintained—saying, "that evidence of usage or custom is received for the purpose of ascertaining the sense and understanding of parties, by their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered as the law of the contract, and it rests on the same principle as the doctrine of the *lex loci*." See also *Jones v. Fales*, 4 Mass. 252; 9 Id. 155; 3 Conn. 13; Pet. C. C. 225; 1 Gall. 443; 3 Day, 346. In the case of *Coit v. The Com. Ins. Co.*, 7 Johns. 385 [5 Am. Dec. 282], parol evidence was admitted to show that by the general usage and custom of merchants and underwriters in New York, the word "roots," in a policy of insurance, was confined to such roots as were perishable in their nature, and that sarsaparilla was not a root perishable in its nature, or included in that term in the memorandum of the policy. It is conceived that the principle of this decision is fully in point.

In Great Britain the principle has been settled in a multitude of cases. The case *Cutler v. Powell*, 6 T. R. 320, goes at least as far as any of the American cases. The action was

brought by an administrator for work and labor done by his intestate. The captain of a ship had given a note to the deceased, by which he promised to pay him a sum of money, provided he proceeded on a voyage, and continued to do duty as second mate, to the port of destination. He died before reaching it, and the action was brought to recover for the services actually rendered. The legal effect of this contract was plain. The right to recover anything by its express terms depended on the performance of services to the place of destination: yet the court of king's bench held, that it was allowable to show the usage and custom of merchants to pay a ratable proportion of the wages, notwithstanding the legal effect of the contract, unexplained by such usage or custom. See also Doug. 511, and 6 East, 202.

It was attempted, in argument, to evade the force of the decision made in 9 Wheaton, and others here cited, because it appeared in these cases, that the party sought to be charged knew of the existence of the usage. But it is plain that the decision did not turn on that fact. There is no difference between those presumptions which the law makes of the existence of a particular fact, from the proof of the existence of other facts—and proof of the fact itself. In other words, when the law raises the presumption of the existence of a fact, the presumption is itself proof of the fact. Where a custom or usage is proved to exist, in relation to a particular trade or pursuit, if it be general, all persons engaged therein are presumed to contract in reference to such usage. Thus, in the case of *Mills v. The Bank of the United States*, 11 Wheat. 431, it is determined that “where a note is made, for the purpose of being negotiated, at a bank, whose custom is to demand payment and give notice on the fourth day of grace, that such custom forms a part of the law of the contract, and it is not necessary that a personal knowledge of the usage should be brought home to the indorser.” See also 1 Cai. 43, and Doug. 518. But in this case, the objection, if it were valid, could not be sustained, as the jury have found that the contract was made in reference to the usage.

It was also objected, that the evidence established a custom general throughout the state, and if so, it was part of the law of the land, and should have been pronounced by the court, and not left to the jury. But the court below (and this court) were bound to take notice that no such usage or custom has obtained here a sufficient length of time, to have the force of law. In all cases where a custom or usage has been engrafted on our system of jurisprudence, so as to become a part of the unwritten law,

there must have been a time when it began to be, at which time, as the court could not take judicial notice of it, it must have been proved not as law, but as evidencing the intention of the parties. What length of time, or what series of judicial determinations is necessary to ripen a custom or usage into law, it is not necessary now to determine. It is sufficient that such was not the fact when this case was tried.

It would be a waste of time to multiply cases to establish the effect that usage and custom have, upon contracts, made in reference to such usage or custom. The cases which have been cited, and many others, might be adduced, conclusively to establish the proposition maintained in this opinion.

It is not intended to invade the general principle, that a written instrument can not be contradicted or varied by parol proof. A charter party, bill of lading, or other mercantile instrument, when clear and unambiguous in its terms, and not made in reference to any usage or custom, is not any more than any other instrument of evidence, to be impugned by parol proof.

There was no error in the charge given by the court below, or in the refusal to the charge as moved by the plaintiffs in error, and the judgment must be affirmed.

GOLDTHWAITE, J., not sitting.

USAGES must be reasonable to be valid: *Barkedale v. Brown*, 9 Am. Dec. 720. So, to be binding, they must be of long standing, uniform in operation, just and reasonable, and known to and acquiesced in by all those whose rights are affected by them: *Hayward v. Middleton*, 15 Id. 615. See also *Jordan v. Meredith*, 2 Id. 373; *Allegre's Adm'r's v. Md. Ins. Co.*, 20 Id. 424, 433, note; *Thompson v. Hamilton*, 23 Id. 619. Usages or customs of particular places are not binding unless parties contract in reference to them; and if the contract be in writing, the reference ought to appear by its terms: *Eager v. Atlas Ins. Co.*, 25 Id. 363. See *Boorman v. Jenkins*, 27 Id. 158. Usages, like other facts, must be proved by evidence, and are not noticed by courts judicially: *Eager v. Atlas Ins. Co.*, 25 Id. 363.

USAGE TO CONTROL LIABILITY OF CARRIER: See *Gordon v. Little*, 11 Am. Dec. 632, 647, note, and cases there cited.

EVERETT ET AL. v. UNITED STATES.

[6 PORTER, 166.]

CASHIER OF A BANK, in the course of his ordinary duties, and by virtue of the general authority of his office, has the right to transfer the paper securities of the bank in payment of its debts.

WHERE AN INDORSEMENT of such paper is made by a cashier, it will be pre-

sumed, in the absence of evidence to the contrary, that it was properly made.

SUCH PRESUMPTION MAY BE REBUTTED by showing that the indorsement was not made in the regular course of business, but in prejudice of the rights and interests of the bank.

CORPORATION MUST, IN GENERAL, ACT THROUGH ITS COMMON SEAL, but it may appoint an agent, whose acts, within the scope of his powers, do not require any seal to impart validity to them.

SURETIES CAN NOT BE PREJUDICED by an arrangement between the creditor and principal debtor whereby time is given to the latter, unless they had knowledge thereof and acquiesced therein.

WHEN IT APPEARS THAT THE TIME OF PAYMENT has been extended by a creditor at the instance of the principal debtor, and no evidence is offered to show that the sureties of the latter had any knowledge of such extension, an instruction, that from the acts of the creditor the jury may infer a knowledge of such extension by the sureties, is erroneous.

APPROVAL BY A CORPORATION of the acts of one acting as its agent, makes those acts as valid as though authorized in the first instance.

ASSUMPSIT in the circuit court of Mobile county. The facts appear from the opinion.

Hopkins, for the plaintiff in error.

Sallee, contra.

COLLIER, J. The defendant in error brought assumpsit on a promissory note, dated the tenth day of March, 1820, against the plaintiffs—by which George Fisher, as principal, and the plaintiffs, as his sureties, promised to pay to the president, directors, and company of the Tombeckbee bank, the sum of five thousand one hundred and sixty-two dollars and fifty cents, ninety days after date.

There were two bills of exception taken on the trial. The first states it to have been proved that the note was indorsed, by John B. Hazard, the cashier of the bank, to the defendant. To this evidence the plaintiffs objected, as insufficient to pass the title in the note, and insisted that there should appear an authority to the cashier, to make the transfer. But the objection was overruled.

It also appeared, from the first bill of exceptions, that Fisher proposed to the bank, after the maturity of his note, to transfer certain lands and land certificates to its proper officers, if the time of payment was extended, so as to allow him to discharge it in eight annual installments—to which the president, etc., of the bank assented, on terms which were not shown to have been communicated to Fisher. Evidence was, however, “offered, tending to show that George S. Gaines received from said Fisher

a transfer of lands and land certificates, under his said proposition, and at the time of such transfer, he gave the said Fisher an instrument, a copy of which is hereto attached, marked C. Evidence was offered to show a sale of the said lands, under the directions of the said bank, and a receipt by them, of the proceeds of the sale, before the assignment to the plaintiffs." A letter of Fisher, dated the first of October, 1824, accompanying the bill of exceptions, was read to the jury, for the purpose of avoiding the effect of the statute of limitations, which was pleaded by the plaintiffs. This letter was held, by the circuit court, to be good evidence for that purpose.

The counsel for the plaintiff (defendant here) having insisted in argument before the jury, that they might, and should infer the assent of the defendants, to conditions imposed by the bank, as set out in B, from the fact that the arrangement was completed by Fisher, with Gaines, the cashier, the defendants (plaintiffs here) requested the court to instruct the jury, that no assent of theirs could be inferred from the acts of the said bank, its officers, or the said George Fisher; that they, defendants, could be alone bound by their own acts or admissions. Which charge the court refused to give as asked for—but charged the jury, that some act or admission of the defendants would be necessary to bind them; but that the said resolution, or minute of the board of directors of said bank, marked B, was before them, and that it was competent for the jury to infer from the same, the assent of the said defendants, to the arrangement proposed and contemplated between Fisher and the bank; but that they were not compelled to draw such an inference, nor was the same conclusive—but that they could draw such an inference, if they thought proper. To which refusal to charge, and charge as given, the defendants except, etc.

The paper marked B, referred to above, is part of the bill of exceptions, and is as follows: "Friday, seventh September, 1821—the board of directors met. Present, William Crawford, president, Buchannan, Malone, Ross, Lyon, Pickens, B. S. Smoot. Col. Fisher's new proposition was laid before the board, and it was agreed, that on condition of his securities consenting to the arrangement proposed, that the president and cashier be authorized to enter into it, and conduct it to the best advantage in their power, for the interest of the bank."

The second bill of exceptions was abandoned by the plaintiffs in error, at the argument.

The questions of law arising upon so much of the first bill of

exceptions, as relates to proof, in avoidance of the statute of limitations, and the charge of the court thereon, were not insisted on by the plaintiffs, in argument. We, therefore, decline considering them now—leaving them to be determined, when they shall hereafter arise. The questions proposed to be considered, are:

1. Did the indorsement of the note in question pass the right of action thereon, to the defendant in error?

2. Can the assent of the plaintiffs in error, to the arrangement between Fisher, the principal debtor, and the president, etc., of the bank, for an extension of the time of payment, be inferred from the acts of the officers of the bank, alone?

1. The act incorporating the Tombeckbee bank invests "the president, directors, and company" of that institution with power "to ordain, establish, and put in execution, such by-laws, ordinances, and regulations, etc., as they may deem necessary and expedient for the good government of the said corporation," etc. It also provides for the appointment of a cashier, or other officers: Toulmin's Dig. 41, 42.

The right of the cashier to transfer the negotiable paper of the bank, depends upon the extent of his powers, as defined by the "by-laws, ordinances, and regulations" of its "president, directors, and company," or else upon the duties which devolve upon that officer, resulting from the nature of his situation. If he be an agent, as most clearly he is, his authority is to be ascertained by the character of his agency; for when this is determined, we have no difficulty in deducing from thence, his powers—the law always implying the delegation of such as are within the scope of his employment. In *Fleckner v. The United States Bank*, 8 Wheat. 358, Mr Justice Story, in delivering the opinion of the court, remarks: "The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, etc., to be used from time to time, for the ordinary and extraordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes and other property, when payments have been duly made. He draws checks from time to time, for moneys, wherever the bank has deposits. In short, he is considered the executive officer, through whom, and by whom, the whole moneyed operations of the bank, in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty, as well to apply the negotiable funds, as the

moneyed capital of the bank, to discharge its debts and obligations." Here is a clear recognition of the right of a cashier, in the course of his ordinary duties, to transfer the paper securities of the bank, in payment of its debts.

In the case at bar it is true, that the inducement to the indorsement by the cashier, does not appear, nor is it considered important that it should. The right being clear, even without a previously expressed authority (as one implied from the nature of his office), we can not suppose, without proof, that the cashier abused his powers by improperly transferring the credits of the bank; but must intend that the act was done for some legitimate purpose. And in the case already cited, the court remark, that "the acts of the cashier, done in the ordinary course of the business, actually confided to such an officer, may well be deemed *prima facie* evidence, that they fell within the scope of his duty." In *Fleckner v. The United States Bank*, the court need not have placed their judgment upon the nature of the office of a cashier, or the powers incident to it; for in that case there was a subsequent recognition of his authority. Yet both grounds are taken, and the reasoning employed, we think, is very satisfactory to sustain the first.

But was this question *res integra*, to be settled with reference to the analogies of the law only, our conclusion would be favorable to the legality of the indorsement of the cashier, for the reason that such an act was within the scope of the powers ordinarily conferred upon that officer. This inference, however, would not be conclusive, and it would still be competent for the party sued, to controvert the fairness of the transfer, by showing that it was not made in the regular course of business, but in prejudice of the rights and interests of the bank. Where this is the case, no title could pass to the assignee, and consequently no action could be maintained by him.

In examining this question, we have not thought it necessary to consider how far a common seal may be necessary to authenticate the acts of a corporation. It is clear that the ancient strictness upon this point has been greatly broken in upon, by a more enlightened current of modern decisions: *Vide The Bank of Columbia v. Patterson*, 7 Cranch, 299; *The Mechanics' Bank of Alexandria v. The Bank of Columbia*, 5 Wheat. 326; *Fleckner v. The United States Bank*, 8 Id. 358. From these authorities, it will sufficiently appear, that though a corporation must, in general, act through its common seal, yet it may appoint an

agent, whose acts, within the sphere of his powers, do not require any such appendage to impart to them validity.

2. It is a rule of very general if not universal application, that no one can be bound by the acts and admissions of another, over whom he has exerted no control; and if to this rule there can be any exception, the charge asked, and that given by the judge to the jury, furnish, in themselves, no reason why we should thus regard this case. There is not the slightest evidence that the plaintiffs were advised that time had been given to Fisher, their principal, yet the jury are instructed, in substance, that a knowledge of such an arrangement by the plaintiffs, as well as their assent to it, may be inferred from the "resolution or minute of the board of directors of said bank, marked B." With equal justice might the operation of the statute of limitations be counteracted, by inferring that the creditor would never have suffered the statute bar to run, had not the debtor acknowledged the debt, so as to prevent it from becoming effectual. In principle, there is no difference between the case stated in the charge to the jury, and that we have supposed—and the principle is this, that where a demand once incurred, is discharged by the negligence or positive acts of the creditor, a jury may infer from his subsequent acts or omissions, incompatible with the idea of a discharge, that the liability is still continuing. The principle maintained in the instruction to the jury, needs but to be simplified, to induce its rejection. Had the plaintiffs been informed of the arrangement between the bank and Fisher, without objection, such evidence might with propriety have been left to the jury, as authorizing the inference (if unexplained in any manner) that it had received their assent; but the record does not inform us, that such proof was offered.

The defendant's counsel, in his argument, attempted to show, that the charge to the jury was upon an abstract question; that by the resolution or minute of the board of directors, the president and cashier of the bank, jointly, were authorized to make the arrangement with Fisher; that George S. Gaines alone acted, and that there was no proof that he was either president or cashier. Without pretending to examine, whether it is necessary for all persons to whom a power is given, to unite in its execution, we are persuaded that the question does not arise in this case. The bill of exceptions informs us, that George S. Gaines received of Fisher a transfer of lands and land certificates under his proposition, and that "evidence was

offered to show a sale of the said lands under the directions of the said bank, and a receipt by them, of the proceeds of the sale, before the assignment to the plaintiffs" (now defendant). Here was an approval of the agency of Gaines, which is well settled to be equivalent to a previously delegated authority: *Fleckner v. United States Bank*; so that it is quite immaterial whether he was either president or cashier.

For the reason then, that there was no evidence of the plaintiffs' assent to an extension of the time of payment, given by the bank to Fisher, the judgment is reversed, and the cause remanded.

GOLDTHWAITE, J., not sitting in this case.

CORPORATION, NOTES OF, VALID WITHOUT SEAL.—In the note to *Mott v. Hicks*, 13 Am. Dec. 561, where the subject is discussed at length, it is stated, that in American courts it is settled that a corporation may make notes and simple contracts without affixing its corporate seal, and that it may be bound, like an individual, by contracts entered into by its agents acting within the scope of their authority, and by contracts implied from a course of dealing, or from the circumstances of a transaction: See cases there cited to sustain the above propositions, and also *Baker v. Mechanics' Fire Ins. Co.*, 20 Id. 664, 667, note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

DEMING v. CARRINGTON.

[12 CONNECTICUT, 1.]

ACTS AND DECLARATIONS BY ONE IN POSSESSION OF LAND as owner, respecting the dividing line between himself and an adjoining proprietor, which are adverse to his interest, are admissible in evidence in an action of trespass against parties entering under and identified in interest with him, although he is alive and competent to testify.

DECLARATIONS ACCOMPANYING AN ACT are admissible as part of the *res gesta*.

TRESPASS *quare clausum fregit*. The question was as to the title to the *locus in quo*, the defendants denying the plaintiff's title, and alleging it to be in one Seth Cowles, under whom they entered and did the acts complained of. Certain acts and declarations of the said Cowles, respecting the dividing line between his land and that of the plaintiff, who was an adjoining proprietor, were offered in evidence by the plaintiff, and received by the judge who tried the cause, against the defendants' objection, that Cowles was alive and competent to testify. The acts and declarations consisted in pointing out to a certain witness, who proposed, on behalf of the plaintiff, to dig a ditch along the dividing line, the place where the line was, and telling him, after part of the ditch had been dug, that it was on the line; and in pointing out to another witness, who had purchased some wood standing on the plaintiff's land, a certain stone, and declaring it to be on the dividing line; whereupon the witness took wood up to that line. Verdict for the plaintiff, and the defendants moved for a new trial on the ground that the evidence above referred to was improperly admitted.

W. W. Ellsworth, for the motion.

Hungerford and Parsons, contra.

HUNTINGTON, J. The objection to proof of the acts and declarations of Seth Cowles, is founded on the general rule of law, which excludes hearsay evidence. This salutary rule, we are not disposed to invade, nor are we inclined to extend the exceptions to it. It must, however, be admitted, that there are several classes of cases in which the spirit of this rule is not violated by the admission of evidence, which in a limited sense, may be denominated hearsay; and we think the present case falls within one of these classes.

The declarations of a person deceased, while in possession of real estate, adverse to his title, are admissible against all who claim under him. This principle is so well settled, as not now to be open to discussion: *Beers et al. v. Hawley et al.*, 2 Conn. 467; *Norton v. Pettibone*, 7 Id. 319 [18 Am. Dec. 116]; *Rogers v. Moore*, 10 Id. 13; *Carne v. Nicoll*, 1 Bing. (N. C.) 430. In the case before us, the plaintiff claimed to be the owner of the premises upon which the alleged trespass was committed. The defendants insisted that the title was in Cowles, under whom they entered; and it was admitted, that the plaintiff and Cowles were adjoining proprietors; and the only question in dispute regarded the locality of the division line between them. The acts and declarations of Cowles which were admitted in evidence, had a direct reference to the extent of his possession; were intimately connected with his title as owner, and his possession as occupant; were adverse to his title; and affected the defendants, who claimed through or justified under him. They were admissions relating to the division line between him and the plaintiff; were of the most unequivocal character; were repeatedly made; and were accompanied with acts showing the extent of his possession and his right to occupy; and were directly at variance with the claim made by the defendants who entered under him. A more appropriate case for the application of the principles to which we have referred can not be stated, unless it is limited to cases where the party whose declarations are offered is dead, or if alive, is incompetent, or can not be compelled to testify; and such is the claim of the plaintiff, supported (as he insists) by the decision of this court, in the recent case of *Fitch v. Chapman*, 10 Conn. 8. It is, undoubtedly, a general rule of law, well calculated to promote the correct administration of justice, that where a person is living and can be called as a

witness, his declarations made at another time, can not be received in evidence: *Barough v. White*, 4 Barn. & Cress. 325; *Spargo v. Brown*, 9 Id. 935.

This rule, however, is not universal. It has exceptions, which harmonize with its spirit, and which rest on as broad a foundation as the rule itself. In the case before us, it may perhaps be well doubted, whether any necessity exists to refer it to the exceptions. There is certainly much force in the arguments addressed to us, and which presented the case as not embraced by the terms of the rule. The defendants do not claim title in themselves. They do not state, that they are purchasers of the property, or in any manner interested in it. On the contrary, they claim the title to be in Cowles, "under whom they entered and did the acts complained of." If they were merely agents of Cowles, having no interest in the premises, acting by his direction and at his request, they are nominal parties only to the suit, while Cowles is the real defendant: and under such circumstances, it would be difficult to find any principle of justice or rule of law, which would exclude the admissions and acts of Cowles, the real party, adverse to his interest: *Bell et al. v. Ansley*, 16 East, 141; *The King v. Hardwick*, 11 Id. 578; *Harrison v. Vallance*, 1 Bing. 45. Besides, if Cowles was the principal, and the defendants his servants, it was urged that he was an incompetent witness, or could not be compelled to testify. His situation, it was said, did not vary from that of the persons whose declarations were admitted in *Beers v. Hawley et al.*, 2 Conn. 467; and *Norton v. Pettibone et al.*, 7 Id. 319 [18 Am. Dec. 116]. In the former case, Miner, who made the admissions, was alive, but he had mortgaged the premises to the plaintiffs, with covenants of seisin and warranty. In the latter case, Marks, although not a party to the suit, had been cited in to defend the title to the land, which he had conveyed to Pettibone: *Fitch v. Chapman*, 10 Id. 12. In the present case, Cowles is alive, and his name is not on the record as defendant; but it appears from the motion, that those who are named as defendants, instead of claiming to be the owners of the premises, insisted, that "the title was in Cowles, under whom they entered," and committed the alleged trespass. We do not, however, intend to express an opinion upon these points, to which we have thus incidentally referred. We wish to place our decision of the question arising upon this motion, upon principles much broader, and

which have received the sanction of our courts, and the courts in Great Britain, and in several of our sister states.

The declarations and acts of Cowles, which were received in evidence, related (as we have before remarked) to the extent of his occupancy. They were made while he was in possession, claiming to be owner; they were adverse to the title now set up by the defendants; and were offered against those who claim through him, or justify under him. Cowles is, therefore, identified in interest with the persons against whom they were offered; and where such identity exists, they are admissible, although the person making them is alive and competent to testify: *Barough v. White*, 4 Barn. & Cress. 325; *Jackson ex dem. Griswold v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]; *Jackson ex dem. McDonald v. McCall*, 10 Id. 376 [6 Am. Dec. 343]; *Norton v. Pettibone*, 7 Conn. 319 [18 Am. Dec. 116]; *Austin v. Sawyer*, 8 Cow. 39;¹ *Hale v. Smith*, 6 Greenl. 416; *Inhabitants of Claremont v. Carlton*, 2 N. H. 369 [9 Am. Dec. 88]; *Sylvester v. Capro*,² 15 Pick. 92. In the argument of the case of *Woolway v. Rowe*, 1 Ad. & El. 114, Patterson, J., addressed the following inquiry to counsel: "Have you looked into the cases on this subject, and found that the statement of a person identified in interest with a party to the cause has never been held admissible, but where the person making such statement was dead? I have never heard the point so presented before. I always thought the party's interest at the time of the declaration was the ground on which the evidence was admitted." And Denman, C. J., in delivering the judgment of the court, says: "The first question raised in this case was, whether the declarations of a person formerly interested in the estate now the plaintiff's, were admissible in evidence, where the party himself might have been called. We think they were receivable on the ground of identity of interest. The fact of his being alive at the time of the trial, when perhaps his memory of facts was impaired, and when his interest was not the same, does not, in our opinion, affect the admissibility of those declarations, which he formerly made on the subject of his own rights."

The case of *Fitch v. Chapman*, 10 Conn. 8, is not opposed to the views we have expressed. In that case the declarations of John Chapman (who was alive) were offered to prove what title he intended to acquire, when he took a deed of the premises to himself. His admissions were, that he made the purchase

1. 9 Cow. 35.

2. *Sylvester v. Crapo*.

for the defendant, and not for himself, although the deed was executed to him as sole grantee. It was an attempt, therefore, by the most dangerous of all evidence—by his own declarations out of court—to give a construction to the deed different from that which the law gave to it; and we said: “The deed shows what title he did actually obtain; and as the question here is merely as to the legal title, that is settled by the deed itself.” Besides, it does not appear that these declarations were made while John Chapman was in possession; nor were they adverse to any title which he claimed to have in the property; nor had they the slightest reference to the nature or extent of his occupancy. It is not easy to perceive any analogy between that case and the one now before us.

There is another view in which the question submitted to us may be considered, and from which it will be apparent, that the evidence was properly received. Cowles was in possession as adjoining proprietor, and directed where the ditch was to be dug, which was to be on the dividing line between himself and the plaintiff. He pointed out the place of that line; made himself a party to the act of digging the ditch there; and may and ought to be treated as having participated in that act. Being then in possession of the adjoining land, and occupying up to a certain place, his declarations accompanying his acts, were admissible as part of the *res gestæ*, showing the extent of his right to occupy and his occupancy in fact: *Williams v. Ensign*, 4 Conn. 456; *Davis v. Pierce et al.*, 2 T. R. 53; *Pool v. Bridges*, 4 Pick. 378; *Wooden v. Executors of Cowles*, 11 Conn. 292.

The ruling of the superior court was correct, and a new trial ought not to be granted.

In this opinion the other judges concurred.

New trial not to be granted.

DECLARATIONS AND ADMISSIONS OF A PERSON IN POSSESSION of land as to the true boundary between his land and that of another, are admissible in evidence, after his decease: *Jackson v. McCall*, 6 Am. Dec. 343. So, generally, the declarations of a deceased person who was in a situation to know the facts, are admissible on questions of boundary, if made before the commencement of the suit: *Coate v. Speer*, 15 Id. 627. And see the note to that case for an extended discussion of the admissibility of hearsay evidence regarding boundaries. Declarations of an occupant of land, while in possession, as to the nature and extent of his occupation, are admissible; but such declarations have no effect where the person making them occupies the land under an absolute deed from the former owner: *Reading v. Weston*, 18 Id. 89. See also *Little v. Libby*, 11 Id. 68. Generally, the admissions and declarations of one in possession of land, relating to his title, and adverse to his interest, are ad-

missible against himself and his successors in interest: *Jackson v. Rard*, 4 Id. 267; *Dorsey v. Dorsey*, 6 Id. 506; *Strickler v. Todd*, 13 Id. 649; *Jackson v. Davis*, 15 Id. 451; *Norton v. Pettibone*, 18 Id. 116. The doctrine of the principal case on this point is referred to with approval in *Bushnell v. Church*, 15 Conn. 421; *Smith v. Martin*, 17 Id. 401; *Ramsbottom v. Phelps*, 18 Id. 285.

LOOMIS v. MARSHALL.

[12 CONNECTICUT, 69.]

TO CONSTITUTE A PARTNERSHIP there must be some joint adventure and an agreement to share in the profit of the undertaking.

SHARING IN THE PROFITS IS THE TEST of a partnership, but the party must share in such profits as a principal; for a stipulation to receive a sum of money in proportion to a *quantum* of the profits as a reward for one's services will not make him a partner.

AGREEMENT TO FURNISH A FULL SUPPLY OF WOOL to a manufacturer for a specified period, to be manufactured into cloth, in a workmanlike manner, providing that the manufacturer is to devote his factory exclusively to that work for the prescribed period, and that the net proceeds of the goods, after deducting incidental expenses and charges of sale, are to be divided between the parties in a certain proportion, each of the parties to pay a certain proportion of the cost of the warp of certain kinds of cloth, and to bear the expense of insurance in proportion to their interest in the division of the profits, and also to share in any insurance paid upon a loss according to the loss which each should sustain, does not constitute such parties partners so as to be liable as such to a laborer suing for compensation for services in the factory.

ASSUMPSIT for work and labor. Plea, the general issue. The plaintiff sought to charge the defendants as partners, and offered in evidence, to prove such partnership, a written agreement between Marshall, Rockwell, Jarvis, and Bass, on the one part, and French and Hubbell on the other, to the effect that the parties of the first part were to furnish to the parties of the second part, "so much wool of a good quality, for the term of two years from the first day of October next, also from this date to said first day of October next, as shall be a full supply for the factory now occupied by said French and Hubbell and owned by Rockwell & Hinsdale. The said French and Hubbell, on their part, agree to devote the entire use of said factory to manufacturing the wool furnished by the said Marshall & Co.; and they agree that all of said wool so furnished shall be manufactured, in a good and workmanlike manner, into broad-cloth of any color said Marshall & Co. shall direct, with the exception of blue; excepting, however, such wool as said Marshall & Co. shall think best to have worked into satinet;

and the warp for what may be worked into satinete is to be paid for as follows, viz.: said Marshall & Co. are to pay fifty-five per cent. of the cost of the same, and said French and Hubbell forty-five per cent. of it; and any expense for insurance which may be effected on wool or cloth, to be paid for by said Marshall & Co. and said French and Hubbell in the same ratio as their interest is in the final division of the avails of the cloth; and in case of the destruction of any wool or cloth by fire, the amount which may be received for the same to be divided as near as may be, as either party may sustain loss." The agreement further provided that French was to render assistance as requested in purchasing wool, charging only for traveling expenses and keeping when called from home; that French and Hubbell were to be at the expense of fitting the cloth for market, except boxing and sending to market, such expense to be divided in the same ratio as the final dividend; that Marshall & Co. were to cause the cloth to be disposed of as they should consider best for the whole concern, and the agreement proceeded as follows: "The net proceeds of all said cloth, after deducting the incidental and necessary expenses of traveling and other proper charges of sale, are to be divided as follows, viz.: said Marshall & Co. are to reserve and keep to themselves fifty-five per cent. of the avails of said cloths, and are to pay over to said French and Hubbell the balance, being forty-five per cent. of the avails of the same." It was further agreed that if the said fifty-five per cent. should not be sufficient to remunerate to Marshall & Co. their capital with eight per cent. interest, they might reserve ten per cent. more, or so much as might be necessary to remunerate them to that extent; and that in case it was necessary for the running of the establishment before the cloths were sold, the said Marshall & Co. were to make advances to French and Hubbell at lawful interest, such advances not to exceed the probable interest of Marshall & Co. in the cloths. It appeared that Marshall, Rockwell, Jarvis, and Bass lived at a distance from the factory; that French occupied the factory before the agreement, and Hubbell went into it afterwards. The jury were instructed, in substance, that the agreement constituted the defendants partners. Verdict for the plaintiff and motion for a new trial.

T. Smith and Church, for the motion.

P. Miner, *contra*.

HUNTINGTON, J. At the trial, the jury were instructed that

the agreement, dated June 1, 1833, constituted the defendants partners, so far at least, as to make them liable as such, in this suit, to the plaintiff. The general question submitted to this court, is upon the propriety of this instruction.

That the parties to this agreement did not intend to create a partnership, either as between themselves or third persons, is, we think, very obvious from the facts set forth in the motion, connected with the stipulations contained in the agreement: and if they are liable as partners, they are made so by construction of law. Those who were to furnish the wool, supposed they alone were responsible for the purchase money; and those who were to perform the labor and provide the materials necessary to complete the manufacture of it, believed they alone were liable for the price of the labor and materials. If they are all jointly liable, their liability arises from the fact that they have entered into a contract, which, as between themselves and the plaintiff, controls their clear intention, if not express stipulation to the contrary. And it is undoubtedly true, that a person may expressly refuse to be responsible as partner, and yet, in the same instrument which contains that refusal, may agree to such terms as will in law constitute him a partner. Whether these defendants have entered into such terms, is to be determined by a fair construction of the agreement which they have executed. While, on the other hand, we should be careful to adopt no rule of construction which would enable parties who are interested in the profits of business, as profits, to deprive the creditors of any portion of the fund on which they have a just claim for the payment of the debts due to them; so, on the other hand (to use the language of Kent, C. J., in *Post v. Kimberly*, 9 Johns. 504), "we must be careful not to carry the doctrine of constructive partnership so far as to render it a trap for the unwary. We must in this, as in other cases, look to the entire transaction, in order to judge correctly of its nature and tendency. And we think, as is said by Gould, J., in *Coope et al. v. Eyre et al.*, 1 H. Bl. 44, 'cases of this nature should stand on broad lines, not on subtleties and refinements, the source of litigation and disputes.'"

A community of interest in land, does not, of itself, constitute a partnership; nor does a mere community of interest in personal estate. There must be some joint adventure, and an agreement to share in the profit of the undertaking: *Porter v. McClure et al.*, 15 Wend. 187; *Green v. Beesley*, 2 Bing. (N. O.) 108; *Fereday v. Hordern*, Jac. 144. This community of profit

is the test to determine whether the contract be one of partnership; and to constitute it, a partner must not only share in the profits, but share in them as a principal; for the rule is now well established, that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner. The cases are collected and well arranged, by Collyer, in his treatise on partnership, 14, 15 *et seq.*, and by Cary, 8, 9, 10, 11. They embrace factors and brokers, who receive a commission out of the profits of the goods sold by them; masters of vessels, who share in the profit and loss of the adventure in lieu of wages; seamen employed in the whale fisheries; shipments from this country to India on half profits; those who receive, in the form of rent, a portion of the profits of a farm or tavern; and a variety of other adventures, to which it is unnecessary particularly to refer: *Dry v. Boswell*, 1 Camp. 330; *Wish v. Small*, Id., note; *Hesketh v. Blanchard*, 4 East, 143; *Mair et al. v. Glenzie et al.*, 4 Mau. & Sel. 240; *Dixon v. Cooper*, 3 Wils. 40; *Wilkington v. Herring et al.*, 5 Bing. 442; *Rice v. Austin*, 17 Mass. 197; *Baxter et al. v. Rodman*, 3 Pick. 435; *Culler et al. v. Winsor*, 6 Id. 335 [17 Am. Dec. 385]; *Turner v. Bissell et al.*, 14 Id. 192; *Muzzy v. Whitney*, 10 Johns. 226; *Ross v. Drinker*, 2 Hall, 415; *Harding v. Foxcroft*, 6 Greenl. 76; *Thomson v. Snow*, 4 Id. 264 [16 Am. Dec. 263]; *Miller v. Bartlet*, 15 Serg. & R. 137. The rule which these and other cases establish, is founded on the distinction which has been taken between agreements by which the parties have a specific interest in the profits themselves, as profits, and such as give to the party sought to be charged as a partner, not a specific interest in the business or profits, as such, but a stipulated proportion of the profits as a compensation for his labor and services: *Ex parte Chuck*, 8 Bing. 469.

We are aware, this distinction has not received the approbation of Lord Eldon, who says, in *Ex parte Hamper*, 17 Ves. 404: "The cases have gone farther to this nicety upon a distinction so thin that I can not state it as established upon due consideration, that if a trader agrees to pay another person for his labor in the concern, a sum of money even in proportion to the profits equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves as profits, he is a partner. It is clearly settled, though I regret it, that if a man stipulates, that, as the reward of his labor, he shall have, not a specific interest in the business, but

a given sum of money even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner." *Id.* 112; *Ex parte Rowlandson*, 1 Rose, 91; *Ex parte Watson*, 19 Ves. 458. We do not propose to examine the reasonableness of the doubts expressed by this distinguished judge. Such inquiry we consider closed, by a series of precedents, which we do not feel at liberty to disregard. They have settled principles, which have for a long period regulated the agreements of parties, in cases to which they are applicable; and they ought not now to be questioned.

The distinction to which we have referred, in our opinion, embraces the present case. The object of Marshall and his associates was, to have their wool manufactured into cloth. They resided at a distance from the factory occupied by French and Hubbell, and were unacquainted with the business of manufacturing. They were willing to avail themselves of the opportunity, which the possession of the factory by French afforded, of having their wool worked into cloth, and of the skill of French and Hubbell to prepare it for market. To secure and increase exertion, they agreed to give them, as a reward for their services and the materials which they should furnish, a certain proportion of "the net proceeds of all the cloths, after deducting incidental and necessary expenses of transporting and other proper charges of sale." It is not expressed in terms to be for such compensation; but this is its legal meaning. In many of the cases to which we have referred, the language of the agreements was not more explicit than in the one now under consideration; but looking at the entire transaction, such was considered the obvious meaning of the parties. French and Hubbell had no other interest in the profits, than such as arose from the agreement to pay them for their labor, etc., in a specific proportion of the amount of the sales of the manufactured article.

It was supposed, however, that this agreement ought not to receive the construction we have given it, inasmuch as Marshall & Co. were to furnish stock for two years; and during the whole of that period, the factory and time of French and Hubbell were to be devoted to the business of manufacturing it into cloth. We do not perceive how these facts can vary the construction of the agreement. Whether a specified quantity of wool was to be worked, or so much as would be "a full supply

for two years;" or whether French and Hubbell were to be constantly employed in the business of Marshall & Co. or might occasionally do business on their own account; does not, we think, evince any other intention of the parties to the agreement, than that which appears to us quite obvious, viz., that French and Hubbell were to receive a compensation for their labor, by a percentage on the sales. Neither the quantity to be manufactured, nor the time to be devoted to the business, can vary the relation between the parties. If they contemplated a division of the profits, as such, they were partners, whether the quantity of wool was specified, or was indefinite—whether the time occupied in its manufacture was longer or shorter. If they provided for the payment for the labor, by allowing a certain sum proportioned to the profits, no partnership was created, although the quantity to be worked might be large, and the period of employment extended to two years.

It was further insisted, that as the agreement contained a stipulation that French and Hubbell should furnish the warp, to be paid by them and Marshall & Co., in the proportion of forty-five to fifty-five per cent. of its cost, it is fairly to be inferred they contemplated a joint ownership of the property, and a joint participation in the profits. A similar argument was urged in the case of *Turner v. Bissell et al.*, 14 Pick. 192; and we are satisfied with the answer given to it by the court: "The circumstance that Root was to find warps, does not affect the principle upon which the distinction as to compensation is founded. If Bissell had agreed with Root to pay him a certain sum for his services and for supplying the warp, there could be no pretense for holding them as partners; and we can perceive no difference in principle, arising from the circumstance that the compensation was to be determined according to the amount of sales."

It was also urged, that the stipulation as to insurance furnished evidence of a joint interest in the business—in the profits as well as in the property. The agreement provides, that the expense of insurance effected on wool or cloth, is to be borne by the parties, in proportion to their interest in the final division of the avails of the cloth; and if any wool or cloth should be destroyed by fire, the amount received under the policy is to be divided, as near as may be, as either party may sustain loss. We think this clause in the agreement shows that the parties contemplated a continued and sole ownership of the wool by Marshall & Co., after its delivery at the factory, rather than a

joint ownership by them and French and Hubbell. The premium of insurance was to be paid in the same proportion as the avails of the sales were to be divided. This was an expense which the parties believed it just, should be reimbursed in that ratio. But the application of the moneys which might be received in the event of a loss, was to be governed by different principles. It was to be divided, as near as it could be, according to the loss which each might sustain. If the wool only was destroyed, Marshall & Co. would alone be interested in the amount received from the insurers; if the materials furnished by French and Hubbell were alone consumed, they alone would be entitled to it; if cloth was burned, each would sustain a loss—Marshall & Co. in the wool, French and Hubbell in the labor and materials. We do not mean, however, to prescribe a rule, by which the division should have been made, in the latter case.

We express no opinion upon the question, whether the price of the wool, and of the work and materials, should be ascertained, by reference to their actual value, or to the sums paid by the respective parties. We mean merely to say, that when the parties agree, that it shall be divided in proportion to the amount of the loss sustained by each respectively, it can hardly be supposed they intended to create any joint interest in the wool furnished by the one, or the materials and labor furnished by the other. If such was their intention, it is difficult to perceive why they did not promise the same ratio of distribution of the moneys which might be paid on the policy, as they did of the expense of the premium and the avails of the sale of the manufactured goods. It is not easy to discover an intention to make a joint concern of the whole business, when provision is made for a division of the amount paid on a loss, in proportion to the loss which each might sustain.

If the views we have thus expressed, be correct, the case before us is not one of partnership, but is properly referable to that class of cases, in which one party receives a share of the profits or avails, as a compensation for services rendered, labor performed, and expenses incurred in the business.

It was claimed in the argument, by counsel, that in the present case, French and Hubbell had no interest in the profits, as that term is understood in the law of partnership. "The main feature in the contract of partnership, is the communion of profit between the parties. Without that quality, a partnership can not exist:" Coll. 44. The cases are to be laid out

of view, in which a liability as partner may exist, *quoad* third persons, arising from the use of his name with his consent, or holding himself out to the plaintiff, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner; in which cases he would be liable to the plaintiff, in all transactions in which he engaged and gave credit to him upon the faith of his being such partner: *Dickinson v. Valpy*, 10 Barn. & Cress. 128. The motion does not state any facts which require the application of these principles. If Marshall & Co. are partners, they are such by force of the written agreement. Does that give French and Hubbell any share of the profits? It was remarked, that it provides for no division of the profits by name, but of "the net proceeds of all the cloths," deducting certain charges and expenses. It was said, that the result to these parties might be different, if the basis of the division was net profits, instead of the net sales; that one party might make a profit, and the other sustain a loss, or both the one or the other, but neither the gain nor the loss would be reciprocal or proportioned to each other; that this would depend on the distinct and independent operations of each, and without any relation of the one to the other; that the profits of Marshall & Co. would not, in the slightest degree, depend upon the cost of the machinery, labor, and materials furnished by French and Hubbell, nor the profits of the latter be connected with the cost of the wool, which comes into view only when it exceeds, with interest at eight per cent. per annum, fifty-five per cent. of the avails of the sales, and then, not for the purpose of closing the concern upon the principle of participation in profit and loss, but to ascertain the fact of such excess, and thus enable the parties to fix the ratio of distribution. If this difference in the result, between a division of the profits, and a division of the avails of the sales, should be kept in view, and in connection with the facts that these parties are contributors to a common object, and the contribution of each party is separate and distinct, and the final division is to be of the proceeds of the sales, and not of the net profits of the business, it was supposed a communion of profit could not easily be discovered. It was insisted, that the profit is the sum remaining after the payment of all expenses connected with the adventure; that from the gross amount of sales, are to be deducted the costs of all the materials, expense of manufacturing, and all other expenses which are a charge on the business; and if anything remains,

that is profit, and nothing else is such; and that in the case before the court, neither the price of the wool nor of the labor and materials furnished by French and Hubbell was to be considered in the division of the proceeds; and that as the profits of the business were not to be divided, but the avails of the sales, it was contended, there could be no community of interest in the profits, upon such a division. The following authorities were cited in support of these views: *Hoare et al. v. Dawes et al.*, Doug. 356;¹ *Gibson et al. v. Lupton et al.*, 9 Bing. 297; *Coope v. Eyre*, 1 H. Bl. 37; *Cheap et al. v. Cramond*, 4 Barn. & Ald. 663; *Catlin et al. v. Wisner*,² 6 Pick. 335; *Lowry v. Brooks*, 2 McCord, 421.

Again: had the agreement provided for a division of the profits, instead of a division of the avails of the sales, but without reference to the original cost of the wool, labor, and materials, it was asked, would there have been any mutuality in the profits? It was admitted, that where by the express terms of the contract, a partnership stock is created in which all have a joint property, but one is not to have any definite aliquot part of it, yet is entitled to an account of the profits, as between themselves, so as to get, as the case may be, at least a specific amount out of the clear profits, the parties to such a contract would be partners; yet it was said, that in the present case, it is quite clear, that in the division of the proceeds, one of the parties might make a profit, while the other would sustain a loss; that if Marshall & Co. had purchased the wool at a low price, they might have been more than reimbursed the original cost and their proportion of the expenses, while French and Hubbell, in procuring labor, machinery, materials, etc., might have expended an amount exceeding what they were entitled to receive under the agreement; and that by a change of circumstances, and the happening of events, Marshall & Co. might suffer a loss, in closing the business, while French and Hubbell would realize a profit. The question was then put to us, whether there can be such a communion or mutuality in profit and loss, as will constitute a partnership, where, by the agreement, the gain or loss of one party is wholly independent of the other, so that while the business in which both are engaged is a source of profit to one, it results in a loss to the other? And we were referred to the observations of different judges in the following cases. In *Coope v. Eyre*, Gould, J., says: "There was no communication between the buyers as to profit and loss.

1. Doug. 371.2. *Cutler v. Winsor*; S. C., 17 Am. Dec. 386.

The profit or loss of the one might be more or less than that of the other." In the same case, Lord Loughborough says: "In order to constitute a partnership, a communion of profit and loss is essential." In *Waugh v. Carver*, 2 H. Bl. 235, 246, Eyre, C. J., says: "The case is reduced to the single point, whether the Carvers did not entitle themselves and did not mean to take a moiety of the profits of Giesler's house generally and indefinitely, as they should arise, at certain times agreed upon, for the settlement of their accounts." In the *United Insurance Company v. Scott et al.*, 1 Johns. 105, Kent, C. J., says, "there was no community between them, as to profit and loss;" and in *Post v. Kimberly*, the same judge remarks: "The profit and loss of the voyage was never to be joint and mutual. The eventual gain or loss of one party, might be very different from that of the other."

We do not express an opinion upon either of these points presented by the counsel for the defendants; for our decision is placed on other grounds, which have been stated. We refer to them, and the argument by which they are attempted to be sustained, that it may appear, they have not been overlooked. They may, with propriety, be examined, when necessary to the decision of cases to which they are applicable.

When the agreement between these parties is viewed with reference to its object, the condition of the parties, the stipulations into which they have entered, and the consequences which would result from holding them liable as partners, in their application to the trade and manufactures of the country, we feel no hesitation in saying, that neither by express agreement nor by construction of law are they constituted partners. We find no intimation that such was their intention; no words used, which evince that French and Hubbell were to have a legal interest in the wool, or Marshall & Co. in the materials furnished by French and Hubbell; no suggestion that all were to be responsible for the purchases and on the contracts of each relating to the business; no evidence that one was to repose confidence in the other, as partner. The parties, in their respective spheres of operation, were independent of each other, excepting that one was to "furnish wool, of a good quality, for two years," and the other was to "manufacture it, in a good and workmanlike manner." The labor of one was to be employed upon the property of the other, with a view to its amelioration. Were we to hold, that this agreement creates a partnership, we think we should change the existing law, as to factors, brokers, agents,

ship-masters, and seamen who share in the profits of a business, by way of commission, or in lieu of wages—should introduce great perplexity and confusion in the adjustment of their legal rights and remedies—should establish a doctrine which would constitute landlords and tenants, where farms are taken on shares, partners in all contracts relating to the occupancy and improvement of the farms; and declare to the enterprising citizens of our country, who possess industry and skill, but are without capital, that they can neither improve farms, nor manufacture goods, nor be employed as mechanics, for a compensation proportioned to the avails of the sales—the product of their labor and skill—without involving themselves and their employers in such responsibility as partners as would to a considerable extent deprive them of employment. We should require well-established precedents, too numerous to be overruled, before we should yield our assent to a doctrine which would produce such consequences.

It was supposed such a precedent exists, and was established by this court, in the case of *Everitt v. Chapman*, 6 Conn. 347. That case, we think, is clearly distinguishable from the one now before the court. There, it was agreed, the parties were, at the time of the purchase of the hides, and had been, for several months previous, in partnership, for the purpose of manufacturing leather. The agreement states, that they had united themselves into a company for the purpose of transacting business to advantage; that the “partners” were to exert themselves to enrich the firm; that the “company” was to be dissolved at any time, by the consent of the parties. In the present case no partnership was, in terms, created; nor is there, in the articles signed by the parties, any allusion to the fact that they are partners. In the case cited, although it is stipulated that each party is to furnish, on his own credit, one half of the hides necessary to keep the tannery in operation, and to receive and make market for one half of the leather; yet there is nothing in these clauses which excludes an entire participation in the profit and loss. The court, therefore, said, “The agreement was, substantially, to share in the profits and loss:” and the case was considered analogous to that of *Gouthwaite v. Duckworth et al.*, 12 East, 421, where two of the defendants purchased goods of the plaintiff, on their own credit, for an adventure, in which they and Duckworth were to share in the profit and loss. In the case before us, French and Hubbell were not under obligation to furnish any wool, nor to pledge their credit for it. In

Everill v. Chapman, it is not entirely clear, that when the leather was manufactured, it was to be equally divided, and a moiety to be taken by each as his separate property. It would seem rather to have been the intention of the parties, that both should bear equally the burden of disposing of the leather in market, for the equal benefit of both, subject to accountability.

This construction of their agreement, comports with the language used. Chapman was "to receive and make market for one half of the leather." Mott was to "make a market" for the other half. The fair meaning of these expressions is, that each of the parties was to take one half of the leather to the best market, and account for the proceeds, when sold. In this view, the stipulation that "the partners should do what was in their power, to increase the property of, and strengthen and enrich, the company or firm," was of much importance. The parties were not merely to furnish stock sufficient to keep the tannery in operation; cause it to be kept in good, useful, and tenantable repair; to do the work "in the tannery, in a faithful and workmanlike manner;" but the leather, when completed, was to be sold in market; each party was to be at the expense, and to perform the labor, of disposing of a moiety, to the best advantage; and thus, the property of the firm be increased and the firm enriched, by the exertions of both, in selling in the best market and at the highest prices. If this be a correct view of the contract in that case, the court might well have inquired, "where is there room for a question?" It was a clear case of partnership. If, however, the leather was to be divided into moieties, each taking his portion without further accountability, it was held by the court, that the purchase of the hides was for all the partners; that had a loss been sustained, it must have been borne by the three, and any profit shared in like manner; and that thus the profit and loss were meant to be joint and mutual. In the case under consideration, we can not give such a construction to the agreement, as would make French and Hubbell liable for all the wool purchased by Marshall & Co., and the expenses of transportation, and for a share of any loss and damage it might sustain, after it was purchased, and before its delivery at the factory; nor, on the other hand, to impose a liability upon Marshall & Co. for the rent of the factory, for debts contracted in the purchase of machinery to work the wool into cloth, or for dyestuffs and other materials and labor necessary to its completion.

Upon the whole, a majority of the court are of opinion, that

the instruction to the jury was erroneous; and therefore, advise a new trial.

In this opinion, BISSELL, CHURCH, and WAITE, JJ., concurred.

WILLIAMS, C. J., dissented, considering the parties to this agreement as participating in the profits and losses, and the case as within the principle recognized in *Everitt v. Chapman*.

New trial to be granted.

PARTNERSHIP, WHAT CONSTITUTES.—Where one person furnishes the capital for an undertaking, and another contributes his services in consideration of a share of the profits indefinitely, a partnership exists between them both as among themselves and with respect to third persons: *Dob v. Halsey*, 8 Am. Dec. 293, and see the note to that case. To the same effect is *Miller v. Hughes*, 10 Id. 719. A partnership is established by proof of an actual community of interest accompanied by an agreement to participate in the profits and to contribute to the losses of the concern: *Brown's Ex'r v. Higginbotham*, 27 Id. 618. Thus, where one leases a farm and another places men to work thereon under the former's management, with an agreement that the net profits, after deducting expenses, are to be divided between them, a partnership exists between such parties: Id. The test is that the profits are to be shared "as profits" in order to constitute a partnership: See the note to *Dob v. Halsey*, 8 Id. 297. Therefore where one is to receive for his services emoluments depending upon the profits and losses of the trade he is to be considered a partner, but if he is to receive a certain and definite portion of the profits he is not a partner: *Simpson v. Feltz*, 16 Id. 602. See also *Wilkinson v. Jett*, ante, 493. For other decisions as to what constitutes a partnership, see *Osborne v. Brennan*, 10 Id. 614; *Spears v. Toland*, Id. 722. To the point that in order to constitute a partnership, there must be a joint undertaking, with an agreement to share in the profit and loss, *Loomis v. Marshall* is cited in *Wheeler v. Farmer*, 38 Cal. 213. So in *Bucknam v. Barnum*, 15 Conn. 73, to the point that community of profit is the test, though the parties must share in the profits as principals, and that the case of *Loomis v. Marshall* was not intended to overrule *Everitt v. Chapman*, 6 Conn. 347. The doctrine of the principal case, that an agreement for compensation to an employee for labor and services by giving him a portion of the profits of the enterprise, does not constitute him a partner, is approved in *Denny v. Cabot*, 6 Metc. 90, 91, and *Bradley v. White*, 10 Id. 305. The case of *Denny v. Cabot*, 6 Id. 90, was declared by the court to be substantially the same in its material facts, as *Loomis v. Marshall*, and the decision followed it. Referring to the principal case, Wilde, J., who delivered the opinion, said: "This case was very ably discussed by the learned judge who delivered the opinion of the court, and, as it seems to us, the decision is fully sustained by well-established principles." The case is also commented upon as an authority for the same position by Field, J., delivering the dissenting opinion of himself and Justices Nelson and Grier in *Seymour v. Freer*, 8 Wall. 223. In *Parker v. Canfield*, 37 Conn. 265, the principle that a share in the profits as compensation for services does not make one a partner, was referred to as one of the exceptions to the general rule that a community of profits is the test of partnership, and *Loomis v. Marshall* was mentioned as "a nicely balanced case" in which that principle was applied.

McALPIN v. LEE.

[12 CONNECTICUT, 129.]

DEFENDANT, IN AN ACTION FOR THE AGREED PRICE OF GOODS, is entitled to an allowance in the assessment of damages of the difference between the contract price and the value, where the property proves inferior in quality to that which the vendor expressly agreed to furnish; but he is not entitled to a further allowance of the amount which he has lost by losing the sale of the property at a profitable advance.

ACTION of book debt referred to auditors, who reported the facts which were found by the court, and the case was reserved for the advice of this court as to what judgment ought to be rendered. The contract was for the delivery on a certain day of "forty thousand feet of white pine lumber, to consist of one and one fourth inch and one inch boards, siding and clapboards in fair proportion; and each stock of inch boards not to contain more than three or four wainy boards; and all the said lumber to be free from rot or loose knots," etc. The other facts, so far as material, and the questions arising thereon, sufficiently appear from the opinion.

T. Smith and Hubbard, for the defendant.

L. Church, for the plaintiff.

CHURCH, J. The plaintiff prosecutes this action on book, against the defendant, for the recovery of the price of a quantity of lumber sold by him to the defendant, and by the defendant received and disposed of. Auditors were appointed, by the superior court, to adjust the accounts of the parties, who reported, that the lumber in question was delivered upon a special written contract, by which its prices and quality were stipulated; that the quality of the lumber delivered was inferior to that promised by the contract, and was worth no more than nine dollars per thousand feet, instead of ten dollars, the contract price. And this difference the auditors have deducted from the amount of the plaintiff's claim under the contract, leaving due to him the sum of two hundred and thirty seven dollars.

In producing this result, the auditors have proceeded upon a principle, which, though formerly doubted, is now well established; that in an action to recover the stipulated price of property sold, which proves inferior in quality to that bargained for, an allowance to the defendant may be made, in the

assessment of damages, of such an amount as constitutes the difference between the price agreed and the value of the estate sold. And the rule is the same, whether the action be for goods, etc., sold and delivered, or upon the bill or note given for the stipulated price; although in England, in this latter respect, a distinction has been recognized, as we believe, without any substantial difference: *Basten v. Butler*, 7 East, 479; *Okell v. Smith et al.*, 1 Stark. Cas. 107; 2 Serg. & Lowb. 316; *Germaine v. Burton*, 3 Stark. Cas. 32; 14 Serg. & Lowb. 152; *Poulton v. Lattimore*, 9 Barn. & Cress. 259; 17 Serg. & Lowb. 373; *Loomis v. Tucker*,¹ 4 Car. & P. 15; 19 Serg. & Lowb. 255; *Street v. Blay*, 2 Barn. & Adol. 456; 22 Serg. & Lowb. 122; *Cutler v. Close*, 5 Car. & P. 337; 24 Serg. & Lowb. 348; 2 Stark. Ev. 645; *Nichols v. Alsop*, 6 Conn. 477; *Cook v. Mix*, 11 Id. 432; *Spalding v. Vandercook*, 2 Wend. 431; *Burton v. Stewart*, 3 Id. 236 [20 Am. Dec. 692]; *Reab v. McAllister*, 8 Id. 109.

At the hearing before the auditors, the defendant has had the full benefit of this equitable principle; and, by the award, has been required to pay no more than the real value of the lumber he received. But he is not satisfied with this; and now claims a further allowance in reduction of the plaintiff's demand, to the amount of one hundred and seventy-five dollars, as damages, which he supposes he has sustained in the loss of the sale of the lumber at a profitable advance; as we infer from the special report of the auditors and the finding of the court thereon. We have not been referred to any case, nor do we know of any principle which will sanction this claim.

If the defendant had paid the contract price, and had then instituted his action to recover his damages for the breach of the contract, we are not prepared to say, that in such action the rule of damages would have been such as the defendant here claims; for we do not think the defendant would have been responsible for any collateral loss or damage not naturally resulting from the breach of contract complained of: *Gregory v. McDowel*, 8 Wend. 435; 3 Wheat. 546;² 5 Id. 385;³ *Hopkins v. Lee*, 6 Id. 109; *Bell v. Cunningham*, 3 Pet. 69; 1 Pet. Cond. 538, *in notis*; 2 Stark. Ev. 359; Chit. on Con. 137, 340. In the case of *Gilpins v. Consequa*, 1 Pet. C. C. 55, the court says: "In estimating the damages sustained, by a breach of contract, the plaintiff is not to recover what he might have made, had the agreement been literally fulfilled."

In the case of *Green v. Pratt*, 11 Conn. 205, we decided that

1. *Lomi v. Tucker*.

2. *The Amiable Nancy*.

3. *La Amistad de Dios*.

a claim of damages for the breach of a special contract, could not be recovered in an action on book, either in the character of a charge on book by the plaintiff, or in reduction of charges made by a defendant.

We shall, therefore, advise the superior court, that judgment be rendered in favor of the plaintiff for the sum of two hundred and thirty-seven dollars, found due by the auditors, without reference to the claim of the defendant, founded upon the special finding of the auditors.

The other judges concurred in this opinion.

Judgment for the plaintiff.

MITIGATION OF DAMAGES IN ACTION FOR PRICE OF GOODS.—In an action for the consideration of a sale of a chattel, or on the security given therefor, the vendee may show, in mitigation of damages, that the property was not as represented, and that the representation was fraudulent, upon giving proper notice thereof: *Burton v. Stewart*, 20 Am. Dec. 692. See also *Steigleman v. Jeffries*, 7 Id. 626, where it is held that in an action for the price of goods the vendee may, by way of equitable defense, give evidence of a warranty and of a breach thereof, without offering to return the goods. The inferiority of the quality of an article sold to that which was represented, is no defense to an action of assumpsit for the price, where the article has been received and used: *Allisons v. Noble*, 13 Id. 230. As to failure of consideration generally, as a defense, see the note to *Le Blanc v. Sanglair*, 13 Id. 378; see also *Lloyd v. Jewell*, 10 Id. 73; *Bradshaw v. Newman*, 12 Id. 149; *Barkhamsted v. Case*, 13 Id. 92; *Wood v. Waters*, Id. 228; *Peden v. Moore*, 21 Id. 649. To the point that in an action for the price of goods the purchaser may show, in mitigation of damages, that the goods were inferior to the warranted quality, the principal case is cited as an authority in *Hitchcock v. Hunt*, 28 Conn. 347; *Avery v. Brown*, 31 Id. 403. It is also referred to as authorizing the general position that a partial failure of consideration may go to reduce the damages, whether the action be directly for the price of goods sold, or on a note or bill given for the price, in *Pulsifer v. Hotchkiss*, 12 Id. 241.

STONE v. STEVENS.

[12 CONNECTICUT, 219.]

ACTION ON THE CASE FOR A MALICIOUS PROSECUTION BEFORE A COURT HAVING NO JURISDICTION, will lie, if the proceedings were malicious, unfounded, and without probable cause, and occasioned legal damage to the accused.

ADMISSION OF A COPY OF THE RECORD, showing the arrest, trial, and acquittal of the defendant in a proceeding under a search warrant, in a subsequent action brought by him for a malicious prosecution, is not a ground for a new trial, where the same facts appear to have been proved by other evidence not objected to by the adverse party.

JURY, IN AN ACTION FOR MALICIOUS PROSECUTION, are to judge as to the honesty, sincerity, and want of malice of the defendant in conducting such prosecution, and it is not error for the court to refuse to instruct the jury that if they believe from the evidence that the court in which the prosecution was instituted would not allow the prosecutor to testify, and denied an adjournment applied for on reasonable grounds, such facts afford sufficient evidence that the prosecutor had probable cause, and acted honestly, sincerely, and without malice.

PLAINTIFF MUST SHOW WANT OF PROBABLE CAUSE and malicious motives on the part of the defendant, in an action for malicious prosecution, notwithstanding his trial and acquittal upon such prosecution.

ERROR OF THE JUSTICE BEFORE WHOM A PROSECUTION was had, in rejecting evidence, etc., can not be inquired into collaterally, in an action for malicious prosecution.

MISDIRECTION, IN ACCORDANCE WITH THE REQUEST OF A PARTY, is not a ground for a new trial applied for by such party.

REASONABLE SUSPICION THAT ARTICLES WERE "TAKEN" by an accused person, does not necessarily afford probable cause for a prosecution for theft.

MERE CONJECTURE OR SUSPICION is not probable cause for a prosecution for theft, but the facts must be such as would induce an impartial and reasonable mind to believe in the guilt of the accused.

MALICE MUST BE PROVED, in an action for malicious prosecution, and though it may be presumed from a want of probable cause, this presumption may be rebutted by showing that the prosecution was without malice, and for justifiable ends.

MOTION TO SET ASIDE VERDICT, LIMITATION OF TIME FOR FILING.—A motion to set aside a verdict, because of the improper conduct of jurors, must, by a uniform and long-established practice in this state, be filed within twenty-four hours after receiving the verdict.

SUNDAYS ARE EXCLUDED IN THE COMPUTATION of the time within which a motion in arrest of judgment must be filed.

ACTION for a malicious arrest, under a search warrant issued at the defendant's instance, by one Joseph Bennett, a justice of the peace, charging the plaintiff with stealing certain drab cloth and other articles. The jury returned a verdict for the plaintiff. The defendant moved to arrest the judgment, on the ground that certain of the jurors had conversed with some of the witnesses about the case after the jury were impaneled. The court rejected the motion, because not filed within twenty-four hours after verdict. By motion in error the case was brought here for revision, on exceptions to this and other rulings of the court. The substance of the exceptions appears from the opinion.

B. I. Ingersoll and Mix, for the defendant.

Kimberly, for the plaintiff.

HUNTINGTON, J. Exceptions were taken to the proceedings

in the court below, which appear on the motion for a new trial, and to the decision of the judge refusing to receive the motion to set aside the verdict, which is the foundation of the motion in error. The court admitted a copy of a document, purporting to be a record of Joseph Bennett, a justice of the peace, as evidence conducing to prove the arrest, prosecution, trial, and acquittal of the plaintiff, on the search warrant, as alleged in the declaration. The defendant insists, that his objection to this evidence should have been sustained. He supposes that the proceedings before the justice, were ministerial and not judicial, and therefore, not the subject of a record; that the warrant to arrest was illegal and void, not being authorized by law; and consequently, that the plaintiff's remedy was by action of trespass, and not on the case for a malicious arrest.

It is unnecessary to decide whether our constitution and laws authorize the arrest of a defendant, upon a search warrant. We express no opinion on that point. But if it be prohibited, the consequence deduced from it, by the defendant, does not follow. It is not a legitimate inference from the premises assumed. An action on the case for a malicious prosecution, may be maintained, where the court has no jurisdiction, if the proceedings are malicious and unfounded, and without probable cause, and occasion legal damage to the party accused. Precedents of such actions are frequent in the history of judicial trials; and they are conformable to the principles which govern these actions. They are well expressed by the court, in *Chambers v. Robinson*, 1 Stra. 691: "A bad indictment serves all the purposes of malice, by putting the party to expense, and exposing him, but it serves no purpose of justice in bringing the party to punishment, if he be guilty:" *Wicks v. Fentham*, 4 T. R. 247; *Pippet v. Hearn*, 5 Barn. & Ald. 634; *Humphrey v. Case*, 8 Conn. 101 [20 Am. Dec. 95]; *Whipple v. Fuller*, 11 Id. 582 [29 Am. Dec. 330].

Nor is it necessary for us to determine, whether the copy of the record of the justice was legally admissible: for the motion states, that the plaintiff introduced the original complaint and search warrant, accompanied with satisfactory parol proof, that the latter was issued and served at the instigation and by the procurement of the defendant; that the plaintiff was arrested thereon; and that he was tried, acquitted, and discharged. To this evidence, no objection was made. The copy proved no more than this; and we can not, therefore, but see, that no injustice

has been done the defendant by the introduction of the copy. We have repeatedly held, that the application for a new trial is addressed to our discretion. We never sustain it, where the verdict is right, and consistent with the facts and justice of the case: *Bates et al. v. Coe*, 10 Conn. 280; *Johnson v. Blackman*, 11 Id. 342.

The defendant also claimed, that the proceedings before the justice were irregular, erroneous, and illegal, inasmuch as he refused to permit him to testify in support of the complaint, and denied a motion for an adjournment, founded on reasonable and proper grounds; and the defendant asked the court to instruct the jury, that these facts, if believed by them, afforded strong and sufficient evidence that he had probable cause for the prosecution; and that his motives were honest, sincere, and without malice in these proceedings. It is hardly necessary to remark, that the instruction asked, was properly refused; for if the evidence was admissible, the jury were to judge whether he acted honestly and without malice. The court would not have been justified in withdrawing from their consideration, this matter of fact peculiarly within their province: *Coil v. Tracy et al.*, 8 Conn. 268 [20 Am. Dec. 110]; *Ravenga v. McIntosh*, 2 Barn. & Cress. 693; *McDonald v. Rooke*, 2 Bing. (N. C.) 217. The instruction which was given, was well adapted to the case, and conformable to the rules of law applicable to it. The court made no particular allusion to the preceding facts; nor did they state, that the orders and decisions of the justice were illegal; but they did inform the jury, that the plaintiff, notwithstanding the trial and acquittal, was bound to prove, that the defendant had no probable cause for the prosecution, and that the motives of the defendant were malicious; because the plaintiff might have been acquitted, "by reason of the absence of full proof of guilt, or in consequence of the mistake or error of the justice:" and having received the testimony of all the witnesses, whose absence occasioned the motion for postponement before the justice, instructed the jury, that it was their duty to weigh and consider all the claims of the parties and the evidence in support of them, whether especially reminded of them, by the court, or not.

We do not perceive any just exception to this charge. It met the whole case, as presented; and enabled the jury to exercise their appropriate duty of passing upon the facts, and returning a verdict according to the evidence before them. It may be added, however, as to the objection, that the jus-

tice rejected proper evidence offered by the defendant, and refused to postpone the trial, it is quite clear, the court below could not notice these facts for the purpose of instructing the jury as to their sufficiency to prove probable cause and want of malice, as it was claimed by the defendant, they should have done. If the justice mistook the law in rejecting the testimony of the defendant, the appropriate remedy for the party aggrieved, if there be any, for such mistake in proceedings of this character—a point we do not decide (*Francis et al. v. Lewis*, 11 Conn. 200)—was by a writ of error founded on a bill of exceptions. And if the discretion of the justice was not properly exercised (a fact which we do not know), it is not the subject of revision at all, even by writ of error; much less can this court inquire, collaterally, into the propriety of that act, in a trial between the same parties in a different suit; and especially where we are not furnished with the means of ascertaining whether the discretionary power of the justice was abused, or suitably exercised: *Woods et al. v. Young*, 4 Cranch, 237; *White v. Trinity Church*, 5 Conn. 187; *Doane v. Cummins*, 11 Id. 152.

It is also objected, that the judge at the circuit omitted to charge the jury as to the existence of probable cause derived from the proof offered, that the "piece of drab cloth" described in the complaint was missed by the partner and workmen of the defendant, soon after the plaintiff left the defendant's service, connected with the accompanying facts stated in the motion. It is supposed, that the instruction was such that the jury could not infer probable cause from this evidence, unless they should find it applied to the other articles mentioned in the complaint, as well as the piece of cloth, inasmuch as they were informed, "that if they believed the evidence, and that the defendant was thereby really induced to believe, and did believe, the plaintiff had stolen the cloth and other articles, and that he was influenced thereby in prosecuting the search warrant, it would furnish evidence of probable cause." It is a sufficient answer to this objection, that the instruction was in precise conformity to the prayer of the defendant. The motion states, "that the defendant offered evidence to prove that the piece of drab cloth described in the complaint, as well as the other articles described therein, were missing," etc.; "that the defendant was informed, by his partner and some of his workmen, that the cloth, as well as some or all the other articles mentioned in the search warrant, were missing; and that they suspected the plaintiff had taken them away with him." It would be a novel

practice to grant a new trial for a supposed misdirection on a point of law, which was ruled in accordance with the claim, and expressed in the words of the party seeking a new trial.

Another exception taken to the proceedings on the trial, is founded on the refusal of the judge to charge the jury in the manner claimed by the defendant, as to what amounts to probable cause, and the proof of malice essential to sustain the action: and also on the supposed erroneous instruction which was given on these points. The instruction asked was this: "If such circumstances existed as would cause a suspicion, in a reasonable mind, that the plaintiff had taken the articles described in the search warrant from the defendant, it amounted to probable cause; and that the malice of the defendant, and the innocence of the plaintiff, must be obvious to the jury, to authorize a verdict for the plaintiff." Independent of other objections to this direction, it would clearly have been open to the objection, that it was not sufficiently precise and definite; and was calculated to mislead the jury as to the principles of law by which they were to be governed. Under such a charge, they might have supposed they were at liberty to find a verdict for the defendant, even had they been satisfied that the plaintiff took the articles from the defendant, in his presence and under a claim of right, and that they were the property of the plaintiff. To take an article from another, and to steal it, are not necessarily synonymous expressions. The plaintiff might have removed them, and yet not be chargeable with theft. The defendant might have had a reasonable suspicion that they "were taken" by the plaintiff, but not the slightest reason to suppose that the plaintiff had stolen them. Yet the court were asked to inform the jury, that if such circumstances existed as would create a suspicion in a reasonable mind, that the plaintiff had taken the articles, it would amount to probable cause. There would have been at least some ground to apprehend that the jury might have been misled by the language of such a charge.

As to the claim for an instruction, "that the malice of the defendant and the innocence of the plaintiff must be obvious to the jury," the same want of precision, and the same danger of misconception, would have attached to it. The word "obvious" might have received different interpretations, by different jurors. Some of them might have supposed it meant the highest attainable certainty; others, that it was to be understood as meaning absolute certainty, to the exclusion of all

doubt; and others might suppose it meant reasonable certainty. The court, very properly, secured the parties against the consequences of these different interpretations, in the instruction which was given, and which is now to be examined. It was as follows: "If they found such facts proved, as would reasonably induce an impartial and reasonable mind to suspect and believe, that the plaintiff had stolen the property of the defendant, as claimed by him, or was secreting the same; such facts would amount to sufficient evidence of probable cause; but that mere conjecture or suspicion did not amount to such probable cause as would justify the defendant:"—"That it was incumbent on the plaintiff, to prove malice in the defendant, in the prosecution of the plaintiff; but if they found, that the defendant had proceeded without probable cause, they might presume from that circumstance, that the prosecution was malicious. And yet, if the defendant had, to their satisfaction, rebutted such presumption, which he might do, and proved that he instituted and prosecuted the search warrant, without malice and for justifiable ends, their verdict ought to be rendered in his favor, notwithstanding they might believe there was no probable cause." That part of the instruction which relates to the necessity of proving malice, the presumptive evidence of it, and the right of the defendant to rebut the presumption, is in accordance with the opinion of this court in *Ives v. Bartholomew*, 9 Conn. 309, and with the cases of *Wells v. Noyes*¹ *et al.*, 12 Pick. 324, and *Williams v. Taylor*,² 6 Bing. 183, and is not questioned.

The only objection to this charge, suggested in the argument (except the points already considered), is, that it advances a rule which is unreasonable and impracticable. It is said, that the defendant, being a party interested, can not be impartial; that he can not view the facts in the same equitable and just light as they would be seen and weighed, by a stranger to the transaction; that if he is required to divest himself of all feeling, and to conform his suspicions and belief to the standard "of an impartial and reasonable mind," it would be difficult, if not impracticable, in any doubtful case, to prove probable cause.

It is further said, that the phrase "probable cause," has reference to apparent guilt merely; and that reasonable suspicion, although not amounting to belief, is a sufficient justification. We are satisfied with the rule, as stated by the court below; and we think it sustained by high authority. The jury were

1. *Wells v. Noyes*.

2. *Williams v. Taylor*.

informed, that mere conjecture, or suspicion, did not amount to probable cause; and this is unquestionably correct. They were also informed, that to constitute it, the facts must be such as would reasonably persuade an impartial and reasonable mind, not merely to suspect or conjecture, but to believe the plaintiff guilty. We can not readily perceive how there can be a well-grounded or reasonable suspicion of the existence of a fact, without there is also a belief of it. We easily see, there may be mere suspicion or conjecture, without any reasonable evidence to induce belief; and such suspicions ought not to be made the ground of legal proceedings, without incurring the consequences of failure. The law ought to require, and, we think, it does require of him who institutes proceedings of the character before us, to have a reasonable belief, that the charge which he makes, is true; that he should not be permitted to gratify the promptings of mere suspicion, under the forms of law, and when proved to be utterly groundless, to shelter himself from liability at the suit of the injured party, by alleging that he suspected, although he had not evidence sufficient to induce the belief, that the charge was true. If he is honest in his belief, he may be said to act impartially, in forming the opinion which he entertains; and the rule given to the jury, is both reasonable and practicable, and is sustained by authority: *Ravenga v. McIntosh*, 2 Barn. & Cress. 693; *Thompson v. Mussey*,¹ 3 Greenl. 305.

In *Willis v. Noyes*,² 12 Pick. 324, Shaw, C. J., says: "The question of probable cause applies to the nature of the suit, and the defendant's knowledge and belief; and the point of inquiry is, whether he had probable cause to maintain the particular suit upon the existing facts known to him." "Had the defendants any probable cause for commencing that suit; and had they in fact any ground to believe they could maintain it? If they had not, then the action was without probable cause." "Had the defendants probable cause, or did they know or believe that the suit was groundless? They might introduce proof, by showing a reasonable ground, on their part, to believe that the action might be sustained." "Legal advice, if used only as a cover, and not acted upon in good faith; if it does not induce an honest belief that the party has probable cause; will not screen him from the consequences of prosecuting an entirely groundless suit." In *Blachford v. Dod et al.*, 2 Barn. & Adol. 179, Lord Tenterden, alluding to the case of *Ravenga v.*

1. *Thompson v. Mussey*.

2. *Willis v. Noyes*.

McIntosh, 2 Barn. & Cress. 693, says, the defendant's defense was, that "he acted honestly in arresting, because he prosecuted on the opinion given him by his legal adviser; and to show that, he gave in evidence the opinion founded on a statement made by himself. Such a defense necessarily introduced a question of fact, whether he did act honestly on the faith of the opinion which he had obtained, believing that the party might lawfully be arrested." In *Munns v. Dupont De Nemours et al.*, 3 Wash. C. C. 31, Washington, J., thus expresses the opinion he entertained on this point: "What then is the meaning of the term 'probable cause'? We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." In *Wilmarth v. Mounford et al.*, 4 Wash. C. C. 79, the same judge, after quoting the preceding definition, says, "to the definition given in this case, the court adheres."

The question between these parties, in the second case, arises upon the motion in error. It appears, that a motion to set aside the verdict, for the alleged improper behavior of some of the jurors, was made after the expiration of twenty-four hours from the time when the verdict was recorded. The court refused to receive it, it not being filed in seasonable time; and this decision we are called upon to revise. The defendant claims he has a legal right to make this motion at any time during the term of the court in which the trial is had; that this is a matter which can not be regulated by practice; and if it can, there has been no practice inconsistent with this claim.

We have not been referred to any statute which prohibits the court from limiting a time within which motions of this kind shall be filed. It was said, indeed, that at the revision in 1821 a provision was made, that if any juror shall converse with any person concerning the cause, except his fellows, while it is under consideration, or shall voluntarily suffer any other person to converse with him, the verdict, on motion, may be set aside; and imposing a fine upon such juror, if convicted of such improper conduct. So far as the provision relates to setting aside the verdict, it is in affirmance of our common law. It introduced no new rule. The section in which it appears was adopted, as it is stated in the note by the revisors, page 50, to sanction, by law, a practice which had prevailed, and which was supported by a judicial determination, to permit the jury, after a cause had been committed to them, to separate and

take refreshments, so as to give them a reasonable opportunity to consider the cause and agree upon their verdict. There is no essential difference, in respect to the time when motions in arrest and to set aside verdicts should be made, between those which are for extrinsic and those for intrinsic causes. If there be any, it would seem reasonable that a shorter time should be allowed, in cases like the present, than in those where the grounds of the motion arise out of the record. If the legislature did not think proper to fix the time of the filing them, it is reasonable to suppose they did not intend to alter the existing practice on the subject. They were conversant with this practice; and nothing appears which leads us to suppose they intended to vary it. It would be very inconvenient to extend the period for filing such motions.

A restraint as to time, if not necessary, is certainly highly promotive of the ends of justice; and is sanctioned by long-continued and uniform usage. The eldest member of the court can not recollect any period when the rule was otherwise, than that these motions are to be made within twenty-four hours after verdict; and applied to all cases, as well where the matters are *dehors* the record, as where they are apparent on its face. In view of a practice so long established, so uniform, and so reasonable, we are all of opinion, that the decision at the circuit, was correct. The same power which this court has exercised in requiring motions for new trials to be filed within forty-eight hours after verdict, for the purpose of facilitating the administration of justice, and preserving the just rights of parties, exists in the other courts, to require motions to set aside verdicts and arrest judgments, to be filed within twenty-four hours after verdict, and has its origin in the same source. In *Beach v. Adm'rs of Hall*, Kirby, 285, decided in 1787, the superior court held, that "no motion in arrest is admissible, unless made within twenty-four hours from the return of the verdict." The same point was ruled in *Sheldon et al. v. Woodbridge et al.*, 2 Root, 473, and is stated to be the settled practice in 1 Id. 572. A practice so ancient, so uniform, and so well calculated to promote the purposes of justice, we have no disposition to change. That power alone which makes law, should alter it, if it be altered at all. We have had occasion, during the present term (*Town of Huntington v. Birch et al.*, 12 Conn. 149), to repeat what we have often declared in previous cases, that although no practice, however uniform and extensive it may have been, can control the express provisions of a statute;

yet the practice we are considering does not contravene the explicit provisions of any law; and when it has been long continued, uniform, and unquestionable, it affords high evidence of what the law is: *Hawley v. Parrott*, 10 Id. 486.

It has been suggested to us, that doubts are entertained, whether Sundays are not embraced within the twenty-four hours allowed for filing these motions. We do not know the origin of these doubts; and we think proper to add, they are without foundation. Sundays are to be excluded in the computation of the time within which these motions are to be filed in court.

The motion for a new trial is denied. There is nothing erroneous in the judgment of the superior court, and it is affirmed.

In this opinion the other judges concurred, except BISSELL, J., who was absent when the case was argued, and gave no opinion.

New trial not to be granted. Judgment affirmed.

CASE THE PROPER REMEDY FOR A MALICIOUS PROSECUTION OR ARREST: See *Shaver v. White*, 8 Am. Dec. 730; *Plummer v. Dennett*, 20 Id. 316; *Turner v. Walker*, 22 Id. 329; *Mowry v. Miller*, 24 Id. 680. See, also, *Whipple v. Thayer*, 29 Id. 330.

MALICE AND WANT OF PROBABLE CAUSE MUST CONCUR to support an action for malicious prosecution: *Kelton v. Bevins*, 5 Am. Dec. 670; *Bell v. Graham*, 9 Id. 687; *Turner v. Walker*, 22 Id. 329; *Adams v. Lisher*, 25 Id. 102; *Leidig v. Rawson*, 29 Id. 354.

MALICE IS A QUESTION FOR THE JURY in such an action: *Turner v. Walker*, 22 Am. Dec. 329. It may be presumed from a want of probable cause, but this presumption may be rebutted by other evidence: *Bell v. Graham*, 9 Id. 687; *Frouman v. Smith*, 12 Id. 267, note; *Turner v. Walker*, 22 Id. 329; *Merriam v. Mitchell*, 29 Id. 514. See, also, as to evidence of malice, *Leidig v. Rawson*, Id. 354.

PROBABLE CAUSE, WHAT CONSTITUTES AND HOW DETERMINED: See the note to *Frouman v. Smith*, 12 Am. Dec. 266, 267; see also *Nash v. Orr*, 5 Id. 547; *Ulmer v. Leland*, 10 Id. 48; *Plummer v. Gheen*, 14 Id. 572; *Miller v. Brown*, 23 Id. 693; *Savage v. Brewer*, 28 Id. 255. Actual guilt of the accused, though not known to the prosecutor, is good cause for the prosecution, and will prevent a recovery for malicious prosecution, though there was a malicious motive in the prosecution: *Adams v. Lisher*, 25 Id. 102. Evidence is admissible on the part of the defendant in an action for malicious prosecution as to what he testified on the plaintiff's trial, for the purpose of showing probable cause: *McMahan v. Armstrong*, 23 Id. 304. So evidence is admissible for the same purpose which was excluded on the plaintiff's trial as being incompetent: Id.

APPLICATION FOR A SEARCH WARRANT on the ground that goods have been stolen, and are concealed upon one's premises, if made maliciously and without probable cause, will be ground for an action for malicious prosecution: *Miller v. Brown*, 23 Am. Dec. 693.

ADMISSION OF INCOMPETENT EVIDENCE OF A FACT SUFFICIENTLY PROVED by other competent evidence is no ground for a new trial: *Hanly v. Blackford*, 22 Am. Dec. 114; *Landon v. Humphrey*, 23 Id. 333; *Crary v. Sprague*, 27 Id. 110 and note. But see, to the contrary, *State v. Allen*, 9 Id. 616. In *Allen v. Blunt*, 2 Wood. & M. 153, the principal case is referred to as an authority for the position that the erroneous admission of cumulative evidence is not ground for a new trial.

ERROR COMMITTED IN A PARTY'S FAVOR is no ground alone for awarding him a new trial: *Griffith v. Depew*, 13 Am. Dec. 441; *Brown v. Caldwell*, Id. 660.

RULE LIMITING THE TIME in which a motion shall be filed to set aside a verdict to twenty-four hours after verdict, is held, in *Tomlinson v. Town of Derby*, 41 Conn. 270, referring to the doctrine of the principal case, not to be an inflexible one, so as to preclude the court in its discretion from enlarging the time. The remarks in *Stone v. Stevens*, that "no practice, however uniform and extensive it may have been, can control the express provisions of a statute," is quoted with approval in *Linsley v. Brown*, 13 Am. Dec. 200.

HUTCHINS v. JOHNSON.

[12 CONNECTICUT, 376.]

CONSERVATOR OF A LUNATIC MAY SUBMIT TO ARBITRATION a claim of his ward against a third person.

CONSERVATOR SUING ON THE AWARD in such a case must show that he was legally appointed.

NOTICE OF THE APPLICATION for the appointment of a conservator pursuant to statute is indispensable to the validity of the appointment, and that such notice was duly given to the ward, must appear by the record to have been found by the court.

RETURN OF SERVICE OF NOTICE in the files brought up with the record, is, in the absence of a finding of notice in the record, insufficient to render the appointment of a conservator valid.

OFFICER'S RETURN IS ONLY PRIMA FACIE EVIDENCE of the fact certified.

CONSERVATOR CAN NOT SUE IN HIS OWN NAME on an award in his favor as conservator pursuant to a submission by him as such conservator.

ASSUMPSIT on an award brought by the plaintiff "as conservator legally appointed of Benjamin Johnson, a distracted person." The award was described in the two counts of the declaration as having been made in the plaintiff's favor as conservator on a submission to arbitration by him as such conservator, of certain matters in dispute between himself as conservator aforesaid, and the defendant, concerning the use and occupation by the defendant of a certain farm, stock, etc., belonging to Benjamin Johnson. Copies of the files and records of the county court which appointed the plaintiff conservator were introduced in evidence to prove the appointment. The

record contained no finding of notice of the application for the appointment having been given to the said Johnson pursuant to the statute, but there was a return indorsed on the application of due service of such application and the accompanying summons. The judge charged the jury in opposition to the request of the defendant, that the plaintiff had authority to make the submission; that his appointment as conservator was not invalid by reason of the absence of a finding of notice in the record; and that the plaintiff could sue in his own name. Verdict for the plaintiff. Motion in arrest of judgment for insufficiency of the declaration, and for a new trial for misdirection.

Larned and Strong, for the defendant.

Backus, *contra*.

WILLIAMS, C. J. The first question is, can a conservator submit to arbitration, questions relative to the estate of the award? It has been settled, by this court, that an administrator may submit claims in behalf of the estate to arbitration: 1 Swift Dig. 365; *Aling, Adm'r, v. Munson*, 2 Conn. 691, 696; *Bean v. Farnam*, 6 Pick. 269, 271. It is true, that an administrator has a legal interest in the goods and chattels of the deceased. A guardian, too, may submit for his ward, and bind himself that the award shall be performed: *Roberts v. Newbold*, Comb. 318. It may be said, that a guardian has also a vested interest in his ward's property. This is true of a guardian in socage and a testamentary guardian under the statute of Car. II. But it is only such an interest as is necessary for the performance of the trust, but not for himself: 14 Vin. Abr. 182; *Redell v. Constable*, Vaugh. 181-183; *The People v. Byron*, 3 Johns. Cas. 56. And a guardian in socage is said to differ only in name from a bailiff: Cro. Jac. 99.¹ And in the case of *Weed v. Ellis*, 3 Cai. 253, it was held, that a guardian could submit a claim, arising from an assault and false imprisonment upon the infant, where no interest whatever had vested in him; and Livingston, J., says: "It is difficult to conceive how it could ever have once been doubted whether guardians had this power. For the very reason that an infant should not bind himself in this way, a power should be lodged elsewhere; and where can it be so properly intrusted as to the very person who has the care of all his property?" The statute of 12 Car. II., authorizing the appointment of testamentary guardians, enacts, that such guardian may

¹ *Shoeland v. Byoler*.

take into his custody, to the use of such child or children, the profits of all their lands, tenements, and hereditaments, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, and may bring such action in relation thereto as by law a guardian in common socage may do: Vaugh. 177. Our statute concerning conservators, directs, that the conservator shall make an inventory of the estate, take care of and manage it, without waste, and apply the avails to the support of his ward. It also gives him power to collect debts and institute suits, and adjust and settle all accounts due from or to him, and to sell the personal estate, etc.: Stat. 274, 275, tit. 49, secs. 1, 2. It would seem as if the statute conferred powers as great as those given by the statute of Charles (although it has not been holden that it confers an interest); and in analogy to the decisions relating to guardians, we think that a conservator may submit to arbitration the claims of his ward: 6 Pick. 272. The case of *The Selectmen*, to which it has been compared, can not govern this; for the selectmen are not authorized even to prosecute suits in behalf of the town; but the conservator may not only settle and adjust claims, but is expressly authorized to institute suits. The objection to this power, therefore, can not prevail.

Another question arises; is this plaintiff a conservator? He has stated, that he was legally appointed; and, of course, he must prove it. The record of his appointment does not show that notice of the application was ever given. Notice of such a proceeding, so important to the subject, is required by the fundamental principles of justice: *Chase v. Hathaway*, 14 Mass. 224. Though it has been but recently required by our statute, our former practice showed the necessity of this regulation, which the legislature intended should be effectual; for after directing that notice should be given, the statute adds, that a conservator shall in no case be appointed, unless notice is given: Stat. 315, ed. 1824. A requirement so salutary should be rigidly enforced; and until such notice is given, the court has no more right to make the appointment, no more jurisdiction in the case, than any other tribunal. It would seem, then, as if it would result, as a matter of course, that a fact so important should be shown to the court, before they proceed; and that it must be found by them, before their proceedings can be valid.

It is claimed, however, that this fact is proved, by the files of the court, viz., the summons and the officer's return. We

have held, that the return of an officer is only *prima facie* evidence, at least not conclusive, of the truth of the fact certified. Now, suppose the defendant wishes to deny the fact therein stated; if the return is to be considered as part of the record, the party is concluded by that which we have held not to be conclusive. If it is no part of the record, how is it to be tried in this court? We can not impanel a jury to test the officer's return. Either way, therefore, the record can not be helped, by the files. We see no reason, if the court below were satisfied that the notice was given, why that fact should not have been found; and for want of such finding this court can not know of its existence. The case presented then to us is that of a court to whom an authority is delegated upon certain terms and conditions, having proceeded to act under that authority, without having seen that those prerequisite conditions were complied with; in which cases we have held such proceedings void: *Allen v. Gray et al.*, 11 Conn. 96; *Hall v. Howd et al.*, 10 Id. 514 [27 Am. Dec. 696]; *Starr v. Scott*, 8 Id. 480.

Another question also was made, whether the suit could be sustained, by this plaintiff, in his own name, were he conservator. The statute has given him power to institute suits, but has not authorized him to institute them in his own name. But it is claimed, that he may prosecute this suit in his own name, as it is upon a contract made with him. How it would have been, had he stated it as a contract made with him, we need not determine. But the plaintiff has been very particular to show, that he is acting and claiming in his representative capacity only. He calls upon the defendant to answer to him as conservator. He states, that, as conservator, he made the submission touching matters relating to the estate of his ward; and that, as conservator, he proceeded to perform, and that the award was to him as conservator—the precise language advised to indicate that he is not suing for himself: 1 Chit. Pl. 205. And the second count differs in no material respect, except as it sets forth the award. If then, this is not a promise to him personally, he can no more sustain this action, than he can sustain an action for the ward's goods or debts in his own name. And in England, it has been long since decided, in case of a committee of a lunatic, that it is contrary to the nature of his authority to sustain suits in his own name: *Drury v. Fitch*, Hutt. 16; *Cook v. Darston*, Brownl. 197; Com. Dig., tit. Idiot, D, 7. See also, *Cameron's Committee v. Pollinger*, 3 Bibb, 11. And as we find nothing in our own statute authorizing

it, we are of opinion, that this declaration is insufficient, and also that a new trial must be granted.

In this opinion the other judges concurred, except *WATTS, J.*, who was absent, being indisposed.

Judgment to be arrested, and new trial to be granted.

WHO MAY SUBMIT TO ARBITRATION WHEN ACTING FOR ANOTHER.—Because a submission to arbitration is a contract, it is necessary, in order to enable one to enter into such submission for himself or another, that he should have capacity to contract with respect to the matter in dispute, either in his own right, or in a representative character: *Morse on Arb.* 3. And because an arbitration is also in the nature of a judicial proceeding, which may lead to a binding determination of the right adjudicated, it follows that in order to make a valid submission to such a determination, one must have the right, not only to institute legal proceedings affecting the subject of controversy, but also to select the forum in which the right is to be tried. This is so, whether the submission is made in one's own behalf, or in that of another whom he represents. Beyond this, it is difficult, if not impossible, to lay down any general rule by which to determine when one person may bind another by a submission to arbitration, for the reason that the powers of persons acting in different representative characters, depend upon entirely different principles. Thus an agent and an administrator both act representatively, but the authority of each rests upon a different foundation from that of the other. The only practicable course, therefore, is to examine separately the decisions respecting the power of different classes of persons acting in a representative capacity, to make a binding submission to arbitration.

AGENTS.—A submission to arbitration is not within the powers of a general agent: *Trout v. Emmons*, 29 Ill. 433. This no doubt arises from the well-known principle that one acting under a delegated authority can not himself delegate it to another. An agent may have the most ample power to bind his principal by his acts and determinations, respecting the subject of the agency; but this of itself gives him no authority to confer upon other persons the power to determine the rights of his principal. The authority thus to delegate to others the power with which an agent is intrusted ought not to be presumed in the absence of express words conferring the authority, or from which such authority may be clearly implied. In other words, the authority must be specially conferred, either expressly or by implication: *Trout v. Emmons, supra*. Where, however, an agent of a member of a partnership is empowered "to act on his [the principal's] behalf in dissolving the partnership, with authority to appoint any other person as he may see fit," he is authorized to submit to arbitration a dispute arising out of such dissolution: *Henley v. Soper*, 8 Barn. & Cress. 16. Here we perceive direct authority given for a delegation of the agent's powers. An agent appointed to prosecute a suit has authority to bind his principal by consenting to a reference under a rule of court, for "an authority to prosecute or defend a suit implies a power to refer it by rule of court, that being a legal mode of prosecuting or defending;" *Buckland v. Conway*, 16 Mass. 396. An authority to "compound" or "compromise" a claim implies a power to submit it to arbitration: *Wilks v. Bark*, 2 East, 142; *Schoff v. Bloomfield*, 8 Vt. 472. Arbitration is a recognized mode of compromising disputes. The contrary indeed is laid down in 2

Para. on Con. 689, citing *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; but, as Mr. Morse well says, the case cited does not bear out the assertion: Morse on Arb. 11. But an agent authorized "to settle" a claim, without more, can not submit it to arbitration, for a settlement is a personal trust: *Huber v. Zimmerman*, 21 Ala. 488. So where an agent was empowered to "sue, ask for, and demand all sums of money due" the principal, or to become due, "in the hands of R. and all other persons whatsoever," and to "settle with R. honorably and fairly out of court" if possible, but if not, to let the court and jury settle, and to exercise a reasonable discretion, etc., the authority was held not to imply a power to submit to arbitration: *Scarborough v. Reynolds*, 12 Id. 252. In this case there was not only an express reference to the personal discretion of the agent, but if he could not settle the matter honorably and fairly, he was to leave it to a "court and jury," thus excluding in direct terms a submission to any other sort of tribunal than those appointed by law. But although an authority "to settle" does not imply a power to submit to arbitration, yet if an agent of an underwriter, empowered to settle losses, has been in the habit of settling them by arbitration, and losses so settled have been paid by his principal without objection, it will be presumed that an authority to submit to arbitration was intended: *Goodson v. Brooke*, 4 Camp. 163. Indeed, it was held in *Hine v. Stephens*, 33 Conn. 504, although that point did not rule the case, that generally, where a power is given to one to "settle" a claim, the mode is discretionary, and that "taking the opinion of men who are presumed to be intelligent and impartial, is only a mode of settling and adjusting" the claim, so that authority to submit to arbitration is implied. The power of sale given to a factor does not authorize him to bind his principal by submitting to arbitration a claim for damages arising out of an alleged breach of an implied warranty of the thing sold: *Carnochan v. Gould*, 19 Am. Dec. 668.

Where an agent enters into a submission to arbitration without authority from his principal, but the latter afterwards ratifies the submission, he is bound by it: *Isaacs v. Beth Hamedash Soc.*, 1 Hilt. 469; *Detroit v. Jackson*, 1 Doug. (Mich.) 106; as where the principal appears before the arbitrators and participates in the proceedings without objecting to the reference: *Memphis etc. R. R. Co. v. Scruggs*, 50 Miss. 284. So where the principal accepts payments or other benefits under an award, he is estopped to deny the authority of his agent by whom the submission was made: *Furber v. Chamberlain*, 29 N. H. 405; *Perry v. Mulligan*, 58 Ga. 479. He ratifies the submission by reaping the fruits of the award: *Perry v. Mulligan*, *supra*. So a submission by an agent is ratified, so as to render it binding on the principal, where the latter assigns the award: *Lowenstein v. McIntosh*, 37 Barb. 251. Where an agent submitted to arbitration a dispute concerning land which he supposed to belong to his principal, but afterwards ascertaining that it belonged to the principal's wife, executed a new submission as the wife's agent, which the other party declined to receive, saying that it made no difference, and the proceedings continued under the first submission, with the full knowledge of the wife and without objection on the ground of want of authority to make the submission, she, as well as the adverse party, was declared to be bound by the award: *Smith v. Sweeney*, 35 N. Y. 291. This case certainly seems to push very far the doctrine of subsequent ratification of a submission made without authority.

It is laid down in *Eastman v. Burleigh*, 2 N. H. 484, that where one makes a submission to arbitration for another without authority, such lack of authority can not be cured by a ratification after an award in the principal's

favor, so as to enable him to enforce it against the other party, but that the submission must be ratified before the award is made. This position seems to rest upon solid grounds. A party certainly ought not to be permitted in such a case to wait until after the award, and adopt it if in his favor, but repudiate it if adverse to him. There is justice, therefore, in requiring him to decide before the award whether he will ratify the submission or not. There is nothing adverse to this in holding him estopped from denying that the submission was authorized, after he has accepted a benefit under the award.

An agent's authority to submit to arbitration should no doubt be under seal, where the submission is required to be by specialty: *Morse on Arb.* 10. But if the submission does not require a seal, though a seal be added, the agent's power to execute it need not be under seal: *Id.*; *Wood v. Auburn etc. R. R. Co.*, 8 N. Y. 160; *White v. Fox*, 29 Conn. 570. Generally, therefore, an agent of a corporation, acting under a parol appointment, may submit to arbitration: *Detroit v. Jackson*, 1 Doug. (Mich.) 106. Where the certificate of acknowledgment to a submission to arbitration by a municipal corporation shows that said corporation appeared and acknowledged the same by A. B., "mayor of said city, and agent for that purpose duly appointed," there is sufficient evidence of such agent's authority to empower the arbitrators to hear and determine the matters in issue, and to enable the court to give judgment on the award: *Detroit v. Jackson*, *supra*. In *Eastman v. Burleigh*, 2 N. H. 484, it is determined that where one assumes to act for another, in submitting a claim to arbitration, his authority to do so must appear in some way on the record.

Power to ratify and confirm an award is not implied in an authority to an agent to submit a claim to arbitration: *Bullitt v. Musgrave*, 3 Gill, 31.

ATTORNEYS.—There is no question that an attorney, solicitor, or counsel employed to prosecute or defend a suit has power to submit it to a reference or arbitration: *Bac. Abr.*, Arbitration (C); *Cald. on Arb.* 25; *Wats. on Arb.* 49, 50; *Kyd on Awards*, 45, 46; *Bill. on Awards*, 52; *Russ. on Arb.* 32-35; *Morse on Arb.* 15; *Weeks on Attorneys*, sec. 233; *Dowse v. Cox*, 3 Bing. 20; *Faviell v. Eastern Counties Railway Co.*, 2 Exch. (W. H. & G.) 344; *Beverly v. Stephens*, 17 Ala. 701; *Bates v. Fisher*, 2 Cal. 355; *Wade v. Powell*, 31 Ga. 1; *White v. Davidson*, 8 Md. 169; *Jenkins v. Gillespie*, 10 Smed. & M. (Miss.) 31; *Pike v. Emerson*, 5 N. H. 393; *Brooks v. New Durham*, 55 Id. 559; *Somers v. Balabrega*, 1 Dall. 164; *Wilson v. Young*, 9 Pa. St. 101; *Bingham's Trustees v. Guthrie*, 19 Id. 423; *Coleman v. Grubb*, 23 Id. 393; *Stokely v. Robinson*, 34 Id. 315; *Smith v. Bossard*, 2 McCord Ch. 406; *Holker v. Parker*, 7 Cranch, 436. There is a ruling to the contrary in *Haynes v. Wright*, 4 Hayw. 64, but it must be regarded as *obiter dictum*, as there was in that case evidence of an express restriction upon the power of the attorney in this respect. Authority to prosecute or defend a suit implies authority to refer it under a rule of court, this being, as remarked under another head, "a legal mode of prosecuting or defending;" *Buckland v. Conway*, 16 Mass. 396. In other words, the attorney's duty and authority in the conduct of a cause, clothe him with all the "powers necessary to the discharge of that duty according to the forms and usages of the court in which it is depending;" *Smith v. Bossard*, 2 McCord Ch. 406. The attorney's power of reference may be exercised without the knowledge or consent of the client, and will nevertheless bind him: *Wade v. Powell*, 31 Ga. 1; *Morris v. Grier*, 76 N. C. 410. So it seems though the client desires his attorney not to consent to a reference: *Wats. on Arb.* 49; *Smith v. Troup*, 7 Com. B. 757. After an order of reference has been made with the attorney's consent, therefore, the

court will not set it aside upon the affidavit of the party denying the attorney's authority, even though no steps have been taken under the order, except appointing a meeting: *Filmer v. Delber*, 3 Taunt. 486. But it is held in *Coleman v. Grubb*, 23 Pa. St. 393, that the client may revoke the submission before it is acted upon. As an attorney has power to submit to a reference or arbitration, so he may bind his client by assenting to an extension of time for making an award under a submission already entered into: *The King v. Hill*, 7 Price, 636. But he can not change the terms of a submission entered into by his client: *Jenkins v. Gillespie*, 10 Smed. & M. 31. Of course, where the client ratifies a submission by his attorney by appearing before the arbitrators, and taking part in the proceedings, he is bound, whether the attorney was authorized to make the submission or not: *Diedrick v. Richley*, 2 Hill, 271.

Though the power of an attorney to submit to a reference or arbitration is affirmed in general terms in most of the cases to which we have referred, it has been held, in those instances in which the question has been directly presented, that the power is limited to a *lis pendens*. In other words, it is said that in order to give an attorney this authority, there must be a cause pending which he has been employed to manage: *Weeks on Attorneys*, sec. 233; *Morse on Arb.* 16; *Bill. Law of Awards*, 53; *Jenkins v. Gillespie*, 10 Smed. & M. (Miss.) 31; *Markley v. Amos*, 8 Rich. L. (S. C.) 468. In the case last cited, it was determined that an attorney could submit to arbitration only by a rule of court, and Harper, J., who delivered the opinion, declared in effect, that even this was an exception to the general rule of law upon the subject; for, said he, "authority to prosecute a suit at law seems to have no relation to the submitting of the suit to arbitration." Mr. Kyd, while conceding the power in a cause pending, gives a very similar reason for denying its existence as a part of the general authority of an attorney before suit. "It is the common understanding," says he, "that the assent of the attorney in a cause to a reference, by a rule of *nisi prius*, will bind the client; and the reason of the difference seems to be this: that in the first case the general character of an attorney does not imply a commission from the principal to do anything so much out of the ordinary course of the business of a general attorney as to refer a matter to arbitration; but the employment as attorney in a particular suit implies the client's assent that he may do everything which the court may approve in the progress of the cause:" *Kyd on Awards*, 45.

We are inclined to the opinion that this restriction of the attorney's authority in such cases to a cause pending, grew out of the early prejudice against arbitration as a mode of settling controversies. As that prejudice has now disappeared, and as the courts have again and again declared, that a submission to arbitration is to be viewed with favor, it would seem that the old rule, that attorneys could only submit to arbitration in a suit already commenced, ought to be deemed obsolete. It appears to us more in accordance with correct views of an attorney's office to hold that whenever he is employed to prosecute or defend a suit, he has, in the absence of an express restriction, the power to submit it to arbitration, either before or after suit commenced. He certainly has a right to elect in what court he will bring a suit, and why may he not elect to try it before arbitrators, a tribunal which the law favors?

Formerly it was held in England that there was a distinction between attorneys at law and solicitors in chancery, with respect to the power to bind their clients by referring a cause, and that while the former possessed the power, the latter did not: *Colwell v. Child*, 1 Rep. Ch. 104. But no such

distinction exists now: Kyd on Awards, 46; Morse on Arb. 17. Certainly there is no room for a distinction of this sort in this country, where there is no line of demarcation between the chancery bar and the common law bar, and where members of the legal profession practice indiscriminately in both courts.

PARTNERS.—The settled doctrine of the law, that a partner has no power, without special authority, to bind his copartner by any sealed instrument, unless it be such as would be valid without a seal, has uniformly been held to apply to submissions to arbitration which require a seal. It has never been doubted, therefore, that such a submission, executed by a partner, without special authority, did not bind his copartners: *Buchanan v. Curry*, 19 Johns. 137; S. C., 10 Am. Dec. 200; *Eastman v. Burleigh*, 2 N. H. 384, *dictum*; *Southard v. Steele*, 3 T. B. Mon. 435; *Steiglitz v. Egginton*, Holt, 141; S. C., 3 Eng. Com. L. 63. In several cases, however, it has been held, that a submission by a partner, not under seal, with respect to a partnership matter, bound his copartners, though made without special authority: *Taylor v. Coryell*, 12 Serg. & R. 243; *Hallock v. March*, 25 Ill. 48; *Southard v. Steele*, 3 T. B. Mon. 435. See also Cald. on Arb. 25, laying down the same rule. But it may now be regarded as settled by the weight of authority, that a submission to arbitration is not in the ordinary course of partnership business, and therefore one partner can not bind his copartner by entering into such a submission, whether under seal or not, unless specially authorized: *Bac. Abr.*, Arbitration (C); Kyd on Awards, 42; *Stead v. Salt*, 3 Bing. 101; S. C., 11 Eng. Com. L. 58; *Adams v. Bankart*, 1 Crompt. M. & R. 681; *Karthauss v. Ferrer*, 1 Pet. 222; *Jones v. Bailey*, 5 Cal. 345; *Buchan v. Grandjean*, 1 Mich. 367; *Backus v. Coyne*, 35 Id. 5; *Harrington v. Higham*, 13 Barb. 660; *Onion v. Robinson*, 15 Vt. 510; *Martin v. Thrasher*, 40 Id. 460; *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442. So as to a submission under the Massachusetts statute: *Abbott v. Dexter*, 6 Cush. 108; *Horton v. Wilde*, 8 Gray, 125. The exigencies of a partnership business do not require that the partners should possess such a power: *Martin v. Thrasher*, 40 Vt. 460. The partner who executes such a submission, however, is himself bound by it: *Bac. Abr.*, Arbitration (C); Kyd on Awards, 42; *Jones v. Bailey*, 5 Cal. 345; *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442; *Karthauss v. Ferrer*, 1 Pet. 222. After a dissolution, where one partner has authority to wind up the business, he can not, it seems, bind his copartner by a submission to arbitration of all matters in difference, in an action brought against an alleged debtor of the firm: *Hatton v. Royle*, 3 Hurlst. & N. 500. But, though a submission by a partner be unauthorized by his copartner, the latter will nevertheless be bound, if he accepts the amount awarded in favor of the firm; for, it is said, this is in the nature of a release or an accord and satisfaction: *Buchanan v. Curry*, 10 Am. Dec. 200.

PERSONS JOINTLY INTERESTED, generally can not bind each other by a submission to arbitration, without special authority: *Eastman v. Burleigh*, 2 N. H. 435. So a submission by some of the heirs or distributees of an estate does not bind their fellows who have not authorized it, though it binds those who executed it: *Smith v. Smith*, 4 Rand. 95; *Boyd's Heirs v. Magruder's Heirs*, 2 Rob. (Va.) 761. But "if several persons do a trespass, and one of the wrong-doers and the party to whom it is done submit to arbitration, and an award is made, the other person shall take advantage of it by way of extinguishment of the trespass:" *Bac. Abr.*, Arbitration (C).

OFFICERS OF CORPORATIONS, MUNICIPAL AND PRIVATE.—A corporation having the capacity to contract and to sue and be sued, has of course the

power to submit a claim in its favor or against it to the determination of arbitrators, which power may be exercised in its behalf by the officer or board in whom its general corporate authority is lodged: See *Morse on Arb.*, 5 *et seq.* A municipal corporation, therefore, unless restricted by its charter, has the power to submit to arbitration a corporate debt or demand, and the common council, as being the chief organ of the corporation, may bind it by such a submission, and may intrust the selection of the arbitrators to the city attorney: *Kane v. Fond du Lac*, 40 Wis. 495. Thus, where the common council has power to cause the streets to be graded at the expense of adjacent lot owners, and to collect the money to defray such expenses, it may submit a claim of this kind to arbitration: *Brady v. Mayor etc. of Brooklyn*, 1 Barb. 584. The selectmen of a town having power to "audit and adjust" claims against the town, have the incidental power of referring them to arbitrators: *Dix v. Dummerston*, 19 Vt. 262. So they have power to submit to arbitration a claim against the town for damages from a defective highway: *Hine v. Stephens*, 33 Conn. 504. It is true that in *Griswold v. North Stonington*, 5 Id. 367, it was decided that it did not come within the authority of the selectmen of a town, *virtute officii*, to bind the town by consenting to the arbitration of a demand regarding the settlement of a pauper. That case, however, is criticised and somewhat shaken, though not expressly overruled, by *Hine v. Stephens*, 33 Id. 504, in which it was said, in commenting upon *Griswold v. North Stonington*, that the judges who composed the court at that time were "emphatically strict constructionists." The power of agents of a town or other corporation to bind it by a submission to arbitration depends upon the same principles and is subject to the same limitations as the authority of agents of private persons. Several cases relating to the power of agents of towns, in this respect, are referred to under a previous head in this note: *Buckland v. Conway*, 16 Mass. 396; *Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Schaff v. Bloomfield*, 8 Vt. 472. The county court of a county having power to enter into a contract for the building of a court-house, and having capacity to sue and be sued with respect to such contract, has the same authority as any other litigant to refer to arbitrators a claim growing out of such contract: *Remington v. Harrison County Court*, 12 Bush, 148.

The power of particular officers of a private corporation to bind it by a submission to arbitration, depends of course upon their authority generally to contract in its behalf. They are in effect agents whose powers are regulated by the charter, by-laws, or votes of the corporation. A few cases will serve to show the principles upon which their authority to consent to an arbitration depends. The president and directors of a canal company having authority by its charter to "agree with the proprietor of land, for the purchase, or for the use and occupation of the land for temporary purposes," may submit to arbitration a controversy arising out of such a matter: *Alexandria Canal Co v. Swann*, 5 How. (U. S.) 83. Where a committee of proprietors of such a corporation are authorized "to settle in behalf of said proprietors, with claimants for damages or loss of land by reference or otherwise," a submission of a dispute of that character entered into by them, representing themselves to be "duly authorized" will be upheld on error, where their authority was not contested at the hearing: *Proprietors of Fryeburg Canal v. Frye*, 5 Greenl. 38. Indeed, although it is not expressly decided in that case, there would seem to be little question of the power of a committee, so authorized, to submit to arbitration. The president of a railroad corporation authorized by vote to receive "at a valuation" a building contracted to be erected for the corporation, may submit the question of value to arbitration,

this being necessarily implied in the words conferring the authority: *Memphis etc. R. R. Co. v. Scruggs*, 50 Miss. 284. Of course, where the officers of a railway corporation intrusted with the power of purchasing land for its line have been in the habit of submitting the price to arbitration and the awards have uniformly been paid without question, an authority to submit to arbitration in future cases of the same sort may well be presumed: *Wood v. Auburn etc. R. R. Co.*, 8 N. Y. 160. So, as in the case of other agents generally, a submission entered into by the officers of a corporation, without express authority, may be ratified by the acquiescence of the corporation and its active participation in the proceedings before the arbitrators: *Isaacs v. Beth Hamedash Society*, 1 Hilt. 469.

PUBLIC OFFICERS GENERALLY.—In *United States v. Ames*, 1 Wood. & M. 76, it is held that no officer of the United States can bind the government by a submission to arbitration in its behalf without the authority of a special act of congress. The submission there was made by the United States district attorney under authority from the solicitor-general or the war department, by a parol agreement out of court. The ground upon which the decision was put was that the whole judicial power under the constitution was vested in the supreme court and in such inferior courts as congress might establish, and that no officer of the government could confer judicial powers upon any other tribunal. This ground seems to us hardly tenable, although the decision itself was probably sound. The reason given would appear to exclude arbitration altogether as a means of adjusting disputes within the jurisdiction of the judicial power of the United States; for if no United States officer can vest judicial functions in any other tribunal than those appointed by law, how can any private individual do so? It is clear that no public officer can enter into a binding submission of a matter not within his official authority. Thus, overseers of the poor have no authority to intermeddle with the property or property rights of a pauper, and they can not therefore submit to arbitration a claim of such pauper against a third person for compensation for services and labor: *Furbish v. Hall*, 8 Me. 315.

EXECUTORS AND ADMINISTRATORS.—The power of an administrator or executor in right of his intestate or testator, to submit to arbitration a claim for or against the estate, with respect to which such personal representative may sue or be sued, is unquestionable at common law: *Bac. Abr., Arbitration (C)*; *Russ. on Arb.* 36-39; *Cald. on Arb.* 32; *Wats. on Arb.* 46; *Kyd on Awards*, 39; *Morse on Arb.* 19; *Jones v. Deyer*, 16 Ala. 221; *Alling v. Munson*, 2 Conn. 691; *Logsdon v. Roberts' Ex'rs*, 3 T. B. Mon. 255; *Overly's Ex'r v. Overly's Devisees*, 1 Metc. (Ky.) 117; *Kendall v. Bais*, 35 Me. 357; *Coffin v. Cottle*, 4 Pick. 454; *Bean v. Farnam*, 6 Id. 269; *Chadbourn v. Chadbourne*, 9 Allen, 173; *Russell v. Lane*, 1 Barb. 519; *Strodes v. Patton*, 1 Brock. 228. The submission of such a claim to arbitration was, at common law, at the peril of the executor or administrator: *Overly's Ex'r v. Overly's Adm'rs*, 1 Metc. (Ky.) 117; for though the award was binding on him as well as on the creditors of the estate, *Strodes v. Patton*, 1 Brock. 228; *Wheatley v. Martin's Adm'r*, 6 Leigh, 62; *Yarborough v. Leggett*, 14 Tex. 677, he was nevertheless liable for the deficiency, if a less sum was awarded on a claim in favor of the estate than was recoverable at law: *Bean v. Farnam*, 6 Pick. 269; *Overly's Ex'r v. Overly's Devisees*, 1 Metc. (Ky.) 117; *Yarborough v. Leggett*, 14 Tex. 677. Where, however, the submission is made pursuant to an express statute authorizing it, such as commonly exists in the United States, the personal representative would probably not be held to incur any liability for a deficiency not arising from any fault or culpable neglect on his part. See the

observations of Mr. Morse on this point in *Morse on Arb.* 2, 3. It was expressly decided that the executor or administrator acting fairly and prudently incurred no personal liability in such a case, under the Kentucky statute, in *Overly's Ex'r v. Overly's Devisees*, 1 Metc. (Ky.) 117. So under the Texas statute it is held that the executor or administrator is not personally liable, and, on that ground, that a submission by him without appeal is void: *Yarborough v. Leggett*, 14 Tex. 677. Even where an administrator's authority to submit to arbitration is not admitted, a want of authority will be cured by the acquiescence of the heirs and creditors who alone have any interest in opposing it: *Lattier v. Rachal*, 12 La. Ann. 695. As an administrator's authority does not extend to the realty, except so far as may be necessary for purposes of administration, he can not make a valid submission in a real action commenced against his intestate in his life-time, before the heir has appeared or been notified: *Bridgham v. Prince*, 33 Me. 174. Formerly a submission to arbitration by an executor was an admission of assets, but it is not so now: *Konigmacher v. Kimmel*, 21 Am. Dec. 374; *Morse on Arb.* 22.

GUARDIANS.—A submission to arbitration by the guardian of an infant of a matter within the scope of his authority as guardian, and concerning which he has power to perform the award, is unquestionably binding both on himself and on his ward after coming of age: *Strong v. Beroujon*, 18 Ala. 168; *Weston v. Stuart*, 11 Me. 326; *Goleman v. Turner*, 14 Smed. & M. (Miss.) 118; *McComb v. Turner*, Id. 119; *Weel v. Ellis*, 3 Cai. 253; *Cald. on Arb.* 24; *Morse on Arb.* 25. So a submission by a parent, as natural guardian, of a claim for damages for a trespass upon his minor child: *Beebe v. Trafford*, Kirby, 215. So a submission by the committee of a lunatic by permission of the court of chancery in England, but not otherwise: *Russ. on Arb.* 39; *Shelf. on Lun.* 179, 396. A guardian *ad litem*, however, has no power except to defend the suit in which he is appointed under the direction of the court which appoints him, and can not therefore transfer the cause to another tribunal by submitting it to arbitration: *Fort v. Battle*, 13 Smed. & M. (Miss.) 133; *Hannum's Heirs v. Wallace*, 9 Humph. 129.

ASSIGNEES OF BANKRUPTS—TRUSTEES.—The assignees of a bankrupt in England have power to submit to arbitration by complying with the provisions of the bankrupt laws on that subject: *Wats. on Arb.* 48; *Kyd on Awards*, 41; *Morse on Arb.* 30. A trustee may enter into a submission for his *cestui que trust*: *Cald. on Arb.* 24; *Davies v. Ridge*, 3 Esp. 101. But it is held that a judge of probate suing on an administration bond, has no authority to refer the cause, for the reason that he "is a mere trustee of the administration bond for all the next of kin and creditors; and he can not submit their rights to reference or arbitration. When a suit is brought on the bond for the benefit of the party indorsing the writ, and who is entitled to have execution for his own use, and the penalty is declared forfeited, the indorser and the defendant may submit to referees to report the sum for which the execution shall issue for the use of the indorser, who is a party to the submission, in which case judgment is rendered for the penalty for the judge in his official capacity, and execution awarded according to the report:" *Thomas v. Leach*, 2 Mass. 152. But though a reference in such a case is void, the report of the referees may be good *prima facie* evidence of the amount due to the legatees upon a hearing in chancery after the bond is adjudged to be forfeited: *Paine v. Ball*, 3 Id. 235.

HUSBAND MAY BIND HIS WIFE by a submission to arbitration touching her chattels or choses in action, or anything of which he may dispose in right of his wife: *Kyd on Awards*, 46; *Cald. on Arb.* 24; *Smith v. Ward*, Styles, 351;

Palmer v. Davis, 28 N. Y. 242, 247, *per Marvin, J.* But not where the controversy concerns her separate estate, or any of her property "which the husband by his own act can not alien:" *Kyd on Awards*, 47; *Fort v. Battle*, 13 Smed. & M. (Miss.) 133; *Miller v. Moore*, 7 Serg. & R. 164. A wife may join with her husband in a submission to arbitration touching her property: *Weston v. Stuart*, 11 Me. 326. Where the submission concerns realty, the title to which is in her, but such submission is by mistake in her husband's name, she may become bound by an award thereunder by ratifying the submission by her agent before the award is made: *Smith v. Sweetey*, 35 N. Y. 291. In a case where it appeared that a husband had made a submission in right of his wife touching the distribution of an estate, and no objection was made in the court below to the submission, but it was not shown when the wife's right accrued, or whether she was living or not, or what interest the husband had, the court refused, in an action on the award, to declare the submission void: *McComb v. Turner*, 14 Smed. & M. (Miss.) 119.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
DELAWARE.

CORBIT v. BANK OF SMYRNA.

[2 HARRINGTON, 235.]

NOTES OF AN INSOLVENT BANK RECEIVED ON GENERAL DEPOSIT by another bank, after the first had suspended, both it and the depositor being at the time in ignorance of the fact of suspension, will render it liable to the depositor for the face value of the notes received.

NOTES OF AN INSOLVENT BANK, or of an insolvent individual, received as consideration of a contemporaneous contract, will operate as payment or satisfaction; but if received on a precedent debt, they will not be a discharge, in the absence of a special agreement.

GUARANTOR OF THE SOLVENCY of the maker of a note is entitled to reasonable notice of his insolvency, and will be discharged if it be not given, though he had knowledge of the insolvency independent of the notice.

ASSUMPSIT. The opinion states the case.

Booth and Rogers, for the plaintiff.

Frame and H. Stout, contra.

By Court, **BLACK, J.** The prominent facts set forth in the case stated are briefly these:

On Monday, twenty-fourth March, 1834, about noon, D. Corbit, as an assignee of David Wilson, received from George Bidle, agent of Ann Ford, one thousand five hundred and ten dollars of the notes of the bank of Maryland, and one hundred and sixty dollars of the bank of Cohens, in Baltimore. On the same day he inclosed them to Presley Spruance, to be deposited in the bank of Smyrna to his credit, stating, that if the bank would so take them, they should remain on deposit for one year, or until a certain suit by George Houston should be ended. On the same day, but after banking hours, Mr. Spruance handed the letter and notes to the cashier of the bank, who

told Spruance he would take the money and pass it to Mr. Corbit's credit as desired, and that Spruance could write to Mr. Corbit that the bank had received the money, which Spruance did by the mail of the next day, and informed him that no objection had been made to the paper. On the next morning (the twenty-fifth) the cashier passed the whole amount of the notes, one thousand six hundred and seventy dollars, to the credit of Mr. Corbit on the books of the bank, in the usual way of deposits as cash. On the morning of Monday, the twenty-fourth, the bank of Maryland stopped payment, and has ever since remained closed, and is unable to pay its debts. Until that morning, its notes had been current in Baltimore. At the time of this deposit, both plaintiff and defendant were alike ignorant of the failure of the bank, or of any suspicion of such failure. On Wednesday, the twenty-sixth, the cashier of the bank received information from a traveler that the bank of Maryland had failed. On Thursday, the twenty-seventh, the directors met and resolved to keep the notes in question by themselves, and directed him to inform Mr. Corbit that the money which had been thus deposited to his credit was received as a special deposit, and that the identical notes were to themselves, and would remain subject to his order. On the afternoon of the latter day, the twenty-seventh, this notice was given Mr. Corbit.

Such are the material facts of this case, and we are called upon to say upon which of these parties, under the circumstances disclosed, does the law place the loss which has arisen from the failure of the bank of Maryland.

Bank notes constitute a large and convenient part of the currency of our country, and, by common consent, serve to a great extent all the purposes of coin. In themselves they are not money, for they are not a legal tender; and yet they are a good tender, unless specially objected to as being notes merely and not money: *Miller v. Race*, 1 Burr. 457; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333; *Handy v. Dobbin*, 12 Johns. 220; *Wright v. Reed*, 3 T. R. 554. They subserve the purposes of money in the ordinary business of life, by the mutual consent (express or implied) of the parties to a contract, and not by the binding force of any common usage; for the party to whom they may be tendered has an undoubted right to refuse accepting them as money.

It would seem, therefore, that they do not in themselves possess, under any circumstances, the abstract legal character

of money; nor are they of themselves the complete representatives of the legal currency of the country. Bank notes, however, as well as the negotiable notes of individuals, which pass by delivery, and not by indorsement, have by judicial determinations acquired, to a certain extent and under certain circumstances, a character as money, which may with propriety be termed a legal character. This arises not from the intrinsic character or worth of the notes, but from the circumstances under which, and the objects for which, they are transferred and accepted. They may be transferred either with or without an agreement or understanding. The agreement may make them money or not money; but if there be no agreement or understanding express or implied, the rules of law, and not any general usage or any assumed conventional regulation, determine when and in what cases they are money and when they are not. This, according to our apprehension, depends on the effect or operation, which according to legal principles, has been produced by the transfer of the notes. If they have worked payment or satisfaction, actual or legal, they are in such case considered as money, and equivalent to so much coin. But if such effect be not produced, then in that case they are not held as money.

In deciding the present case, it is not essential that we should determine whether the character which bank notes have obtained as money be one that is intrinsic or conventional; but the question may properly be disposed of by applying to it those principles of law which have been settled in relation to the transfer of negotiable notes payable to bearer, whether issued by banks, other corporations, or individuals. It may be proper, however, briefly to advert to the position that has been urged upon us, that the character of bank notes as money is purely a conventional regulation.

Chancellor Walworth, in the case of the *Ontario Bank v. Lightbody*, 13 Wend. 104 [27 Am. Dec. 179], states that the receiving bank notes as money is not a legal but conventional regulation, and obtains only so long as the bank redeems its notes in specie; that while thus redeemed, they are considered as money and are taken at the risk of the receiver; but that the moment it ceases to redeem its notes, they cease to be the conventional representative of the legal currency of the country, whether the holder be aware of the fact or not; and if they are afterwards passed off by him, he must sustain the loss which has already occurred. However highly we respect the decisions

of that able judge, we must hesitate yielding assent to the position he has assumed, if it is to be one of universal application; if it is to be applied to contracts and debts of all classes—to cotemporaneous as well as pre-existing debts. He has adduced no authorities in its support, and it seems to us to be at variance with prior decisions both in this country and in England. The character which bank notes, or any other negotiable notes, have as money; the legal effect of a payment in them, and the agreement implied on receiving them; seem not to arise from or to be established by any conventional regulation. The community may, for the facilities of business, by what may be assumed to be common consent, or a conventional regulation, receive bank notes; they may receive them with an express agreement or without any agreement, or may refuse them altogether, for they are not a legal tender: and so may each member of the community. But if they be received without any agreement or understanding as to liability, the law regulates their operation, and settles how far they are to be considered as money.

Judicial decisions, therefore, and not conventional regulations, we apprehend, have settled, and must continue to settle the point, how far and when bank notes or other negotiable notes, when passed away, are to be deemed money and operate as money. If they are passed in payment of a precedent debt, courts of justice have settled their character in such case, and their legal operation. If they are parted with in exchange or sale, the rules of law as to each of these being the same (2 Black Com. 446), their character and effect have in like manner been fixed by the determinations of courts. These rules do not depend on, nor are they affected by the solvency or insolvency of the makers of the notes, nor are they based on any conventional regulation. When such notes are transferred from hand to hand, they pass, not according to what may be assumed to be a conventional regulation, but according to the legal rules or principles which courts have applied to such transfers. If the community, or any individual, wishes to get rid of the principles that courts have thus fixed, or to avoid their application, it is not to be effected by what may be considered a conventional regulation, but by adopting such a course of conduct, where bank notes are tendered (either refusing them, having an agreement, or taking a guaranty), as will prevent the application to the transaction of the established rule. Test the principle that by the conventional regulation, bank notes cease to represent the legal currency of the country from the moment

payment of them in specie is refused, and all loss thereafter falls on him who passes them, by the course of our banking institutions and the business transactions of our country during the last twelve months: none of the banks paid their notes in specie; no debts or contracts between individuals were discharged in specie; and yet the only currency was bank notes. Is this conventional regulation to be applied to all transactions during the period of suspension? Were no contracts legally fulfilled nor debts discharged? Are those who passed bank notes responsible for the difference in value between them and specie? This will not be pretended. Although the suspension of specie payments was universal on the part of the banks, it was not during that period the conventional regulation that their notes did not pass as money; for they were almost universally received as such by banks and individuals. It does not, therefore, follow, that because a bank has suspended specie payments that her notes no longer pass or operate as money; nor that the person who may afterwards pass them *bona fide* is necessarily a guarantor of their solvency. That depends upon the purpose to which they are to be applied, whether to pay a pre-existing debt, or to fulfill a contract made at the time.

In the case of *Cambridge v. Allenby*, 13 Com. L. 201,¹ Littledale, J., says: "I think there is no guaranty implied by law in the party passing a note, payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed." Bayley, J., in the same case, says, that if the notes (those of a banker who had failed on the day of the sale) had been delivered at the time the corn was sold, instead of some hours after, the person receiving the notes would have been without remedy, as the notes would have operated as payment.

In *Young v. Adams*, 6 Mass. 182, Judge Sewall, in delivering the opinion of the court, says: "The responsibility of the bank, when the bills are true and genuine, is, we believe, at the risk of the receiver, except when paid after a known failure, if the fact be known to the payor, and the payee may be supposed to be ignorant of the fact. In *Whitbeck v. Vanness*, 11 Johns. 409 [6 Am. 383], Justice Spencer, in commenting on the case of *Markle v. Hatfield*, 2 Id. 455 [3 Am. Dec. 446], which was decided while he was a member of the supreme court, declares his opinion, that if a bank note has been passed away for a cotemporaneous debt, there is no liability on the

1. *Cambridge v. Allenby*, 13 Com. L. 175; 8. C., 6 Barn. & Cress. 373.

person passing it, although the bank had at the time failed, if both parties were equally ignorant of the fact.

From the language of Chief Justice Kent, in the case of *Markle v. Hatfield*, such would seem at that time to have been the inclination of his mind, for he says: "The negotiable note of a third person and a bank note are equally promissory notes for the payment of money; and if the receiver may be presumed in the one case and not in the other to have taken upon himself the risk of the solvency of the drawer, there is no presumption in either case, that he takes upon himself the risk of forgery."

If the rule laid down by Chancellor Walworth was intended by him only to be applied to cases of "antecedent debts," which was the case before him, and decided by him on that ground, there is perhaps no discrepancy between his opinion and those which we have cited; but if it was designed by him to go further, it is at variance with the cases referred to, and is not sustained by authority. It has, however, been urged with great ingenuity by the counsel for the defendants, that as to bank notes and the negotiable notes of third persons, payable on demand, the rule of law is the same, whether they be given in payment of a "precedent debt" or for goods bought at the time the note is given in payment, and which have been denominated cotemporaneous debts. To this position, after a close examination of the authorities cited, we can not yield assent. A distinction has existed in England for more than a century. In the latter case, the notes operate as payment, and are, therefore, held to be the same as money, and the risk of the solvency of the maker of the note is upon the person receiving, for no debt strictly is created; no credit is given to the person, but it is given to the note accepted; it is a sale or exchange. In the former case they are not payment, and therefore not held as money, and the risk is upon the person paying, for there a personal credit has been given, a debt created; unless in either case an agreement to the contrary, express or implied, be established. If at the time of contract a negotiable bill or note payable on demand, either of an individual or corporation, be transferred and received without indorsement, or any agreement or understanding as to risk, whether in exchange for goods sold and delivered, or for other bills or notes, money or credit; it is a sale of such bill or note by the party delivering it, and a purchase of it with all risks by the party receiving it. It is considered in the same point of view as exchanging money for money, and the law implies, in the absence of proof to the

contrary, that it was part of the original contract, that such note or bill was taken in absolute payment: for if such had not been the understanding, the receiver would either have refused the note or taken some guaranty of its goodness.

This rule was first laid down by Chief Justice Holt, in 1699, in the case of the *Bank of England v. Newman*. It prevailed in England through the last century, and is recognized as recently as the year 1837, in the case of *Camidge v. Allenby*, to which we have before referred. If the notes be given at the time the contract is made and executed, the person taking them has no remedy against the person from whom he receives them, although it may afterwards appear that they were at that time of no value. But if the notes be given subsequently to the contract (though but a few hours, as in the case last referred to), in payment of a "precedent debt," the risk of solvency is not on the person receiving, but on him who gave it in payment. To sustain these positions we refer to the following cases: *Bank of England v. Newman*, 1 Ld. Raym. 442, and 12 Mod. 241; *Hartop v. Hoare*, 3 Atk. 51; *Ward v. Evans*, 2 Ld. Raym. 930; *Fyddell v. Clark*, 1 Esp. Cas. 447; *Emly v. Lye*, 15 East, 12; *Hornblower v. Proud*, 2 Barn. & Ald. 327; *Camidge v. Allenby*, 13 Com. L. 175; *Stedman v. Gooch*, 1 Esp. Cas. 3; *Puckford v. Maxwell*, 6 T. R. 52; *Byles on Bills*, 91; *Whilbeck v. Van Ness*, 11 Johns. 409 [6 Am. Dec. 383].

In what we have said in relation to the rule that has been adopted and the distinction that has been taken, we are to be understood as speaking of cases which are free from fraud, and where the notes are genuine and such as they purport to be; for if they prove to be counterfeit, or if there be misrepresentation, concealment, or fraud of any kind, a transfer of such notes, or genuine notes under such circumstances, will not in either case be held to be payment: *Jones v. Ryde*, 5 Taunt. 488; S. C., 1 Com. L. 252; *Markle v. Hatfield*, 2 Johns. 459 [3 Am. Dec. 446]; *Willson v. Foree*, 6 Id. 110 [5 Am. Dec. 195].

Our conviction that the distinction to which we have referred being at this time the settled law has not been shaken by the cases brought forward by the counsel for the defendants. The existence of the rule, and its propriety, are different questions. If we find it established we are bound to yield to it. In *Lightbody v. The Ontario Bank*, 11 Wend. 11, which was the case of a note of a bank that had failed, being given in payment of a "precedent debt," and was expressly decided by the court on that point, Chief Justice Savage seems to doubt rather than

deny the distinction that has been taken, and to make the law as to cotemporaneous debts depend on the proof that may be made of what was the understanding or agreement of the parties at the time of the transaction; without, however, determining what is the rule of law where there is no evidence of any understanding. The authorities cited by the chief justice, which we will proceed to notice, do not deny the distinction between cotemporaneous and precedent debts, but rest on principles altogether distinct from this question.

In *Owenson v. Morse*, 7 T. R. 64, and in *Roget v. Merrill and Clapp*, 2 Cai. 117, the contract had not been completed; it remained executory; there had not been a delivery either of the goods sold or of the note which was to be received in payment; and under these circumstances it was held, that as the consideration had failed by the insolvency of the maker of the note, before the goods had been delivered or the note tendered, the vendor was not bound to deliver the articles sold, nor to answer in damages for their non-delivery, upon a tender of the note being made. Both these cases depended on the point of delivery and the right to stop goods *in transitu*, where there had occurred a failure of consideration before the contract had been carried into execution.

Puckford v. Maxwell, 6 T. R. 52, was a case of payment to an antecedent and not of a cotemporaneous debt; and so too, from the language used by Lord Kenyon, would seem to have been the case of *Stedman v. Gooch*, 1 Esp. Cas. 3; *Markle v. Hatfield*, 2 Johns 455 [3 Am. Dec. 446], was the case of a counterfeit note; *Johnson v. Weed*, 9 Id. 310 [6 Am. Dec. 279], turned on a fact which was controverted, viz.: whether there was any agreement or understanding between the parties, at the time of the transfer, as to the note being indorsed or taken without recourse. In *Whitbeck v. Van Ness*, 11 Id. 409 [6 Am. Dec. 383], Judge Spencer cites with approbation the decisions of Chief Justice Holt establishing the distinction referred to. He assented to the judgment given by the court in *Markle v. Hatfield*; but says the reasoning of the chief justice went further than he or his associates intended. It does not seem to have been necessary in the case of *Lightbody v. The Ontario Bank*, to have decided whether there existed such a distinction; for that was the case of a note that had been given in payment of an antecedent debt, and as to such cases it had never been doubted that the risk of solvency rested on the person who transferred the note. In the same case, when taken to the

court of errors, 13 Wend. 101 [*Ontario Bank v. Lightbody*, 27 Am. Dec. 179], Chancellor Walworth confines himself to antecedent debts, and rules as to these, that bank notes, or the notes of third persons, when given in payment, are taken at the risk of the party paying, unless there be an agreement to the contrary. Senator Van Schaick, who delivered an opinion in the same case (page 111), coincides with the view taken by the chancellor, and in the principles pronounced by him in relation to antecedent debts.

Chief Justice Savage says, 11 Wend. 11, he "apprehends there has generally been some circumstance in each case by which the court and jury could ascertain what was the agreement between the parties as to who should run the risk of the solvency of the note transferred in payment of goods." Now, if there be no such circumstance, what rule does the law apply to the case? For it is in such cases that the law is called upon to furnish a rule, and not where there is an agreement or a circumstance that will satisfy the court and jury that there was an agreement. Unquestionably, that the note given at the time in payment for goods sold is at the risk of the person receiving; in the absence of proof of any agreement, or of circumstances showing an agreement, as to the matter of risk.

In the case of the *Ontario Bank*, we can perceive no circumstance from which any agreement as to who should bear the risk of solvency can be collected, except the mere fact that the bank paid out, on a check drawn on it, the note of a bank that had stopped payment: now this is not such a circumstance as will establish an agreement one way or the other; or else on the same principle, in every case in which a note had been passed off, which proved not to be of specie value, a like agreement would be inferred, and the person passing it be held a guarantor of the note, because he passed it: nor did the court decide that case on such a ground, but on the principle that the note paid out by the bank did not discharge the debt which the bank antecedently owed to *Lightbody*.

Judge Sutherland, in delivering the opinion of the court in *Porter v. Talcott*, 1 Cow. 359, questions the propriety of the distinction, but not the fact of it having been taken. He says: "A distinction is sometimes taken as to notes of third persons, whether given at the time of making the contract or for a precedent debt; but I apprehend, in neither case is it payment, unless it is agreed to be so taken, and if agreed to be so taken, it is equally payment in either case." Unquestionably the

settled rule of law as to responsibility may, in either case, be prevented from applying to the transaction by an agreement of the parties. If one purchases an article and delivers in payment for it a note, which is received without objection and nothing said about it, can it be said that there has been any agreement respecting its solvency, either express or implied between the parties? Certainly not. There being then no agreement, the law has to furnish the rule by which the transaction is to be governed. It settles what is to be taken as the legal consequence, effect, or implication arising from the naked facts. If, however, an agreement be established, the law will carry out the agreement, and not apply to the case a rule regulating cases where no agreement has been made.

In the absence of evidence of any agreement, or of circumstances from which an agreement can be ascertained as to who should bear the risk of solvency, repeated judicial decisions have settled it as a legal principle, inference, or implication, that when the note of a corporation or of a third person is given for a precedent debt, the solvency of the maker rests on him who passes it; because such debt can not be discharged except by actual payment; paper, in itself, not being payment unless it produces money or its equivalent: but that, when such note is given at the time of contract, sale, or exchange, in good faith, either for goods, money, bills, notes, or credit, the responsibility of the solvency of the note rests on the person who receives it. In the latter case, if there be no agreement established, nor any circumstance indicating an agreement or understanding, is not the fact of the note being accepted without objection, or agreement, or indorsement, pregnant evidence of the understanding of the parties, that the note was received in absolute payment and as so much money? Does not the law rightly conclude that he was satisfied and voluntarily assumed the risk of solvency, when he had the power, which he declines exercising, of preventing all question or doubt on the subject, by refusing the note, or requiring an indorsement or guaranty of it?

The distinction between precedent and cotemporaneous debts has prevailed in England ever since 1699, and has been recognized in the state of New York, by the courts of that state; or why, in stating the rule of law as to the cases in which notes do not operate as payment or so much money, have those courts confined it to "notes given in payment of antecedent debts," if they considered that it was also applicable to notes given at

the time of making the contract? By applying it to one class of debts, is it not a necessary inference, that they did not design to apply it to the other, but recognized a distinction between them? That the rule has been so restricted will appear from 5 Johns. 68;¹ 11 Id. 410;² 520;³ 12 Id. 411;⁴ 3 Johns. Cas. 72;⁵ 13 Wend. 104.⁶

No case like the one before us, so far as we can ascertain, has ever been brought before the courts of this state: the only one bearing any analogy to it is the case of *Jefferson and Jefferson v. Holland*, decided by the late Chancellor Ridgely, in Sussex county, at the March term, 1820. In that case the complainants had sold to the defendant a tract of land, who gave his bond for the purchase money. In January, 1818, Holland paid one half the purchase money in bank notes, and promised to take them back if there should be any difficulty in passing them. On the first of July, 1818, about noon, Holland paid the complainants the second moiety of the purchase money in notes of the bank of Somerset and Worcester, at Snow Hill, to the nominal amount of seven hundred and twenty dollars, in discharge of his bond. Jefferson observed at the time of this payment, that he supposed it was good money, and Holland answered that it was. The notes of the Snow Hill bank had been depreciated since the tenth of June, 1818, when the bank stopped specie payments, but they circulated at a discount at the place of this payment until the evening of the first of July, 1818. The complainants believed those notes to be good at the time they took them, but finding that the notes would not pass, they offered to return them to the defendant on the sixth of July, and on the eleventh of July presented them at the bank, where payment in any way was refused. The chancellor decreed in favor of the complainant, saying: "The justice of this case is entirely with the plaintiff, and I can not do better than to adopt the opinion of Chief Justice Kent, in the case of *Markle v. Hatfield*, 2 Johns. 455 [3 Am. Dec. 446]. This, indeed, is rather stronger on the part of the complainants. It may be doubted whether the defendant had not knowledge of the state of the Snow Hill notes, at the time of the payment: at any rate he assured the plaintiff that they were good." That case varies essentially from the one before us, and can not have any influence or weight in our present decision.

1. *Tobey v. Barber*; S. C., 4 Am. Dec. 326.

4. *Arnold v. Camp*; S. C., 7 Am. Dec. 328.

2. *Whitbeck v. Van Ness*; S. C., 6 Am. Dec. 383.

5. *Herring v. Sanger*.

3. *Witherby v. Mann*.

6. *Ontario Bank v. Lightbody*; S. C., 27 Am. Dec. 178.

1. The notes in that case were given in discharge of an antecedent debt, and did not operate payment.

2. There were suspicions of fraud against the defendant; that he passed the notes, knowing their depreciated state.

3. That he passed them with an assurance to the complainants that they were good.

We have not heard or seen anything in the course of the argument of this case, or in the authorities produced, which inclines us to unsettle a rule of law long established in that country from which our principles of jurisprudence have been drawn: and after considering the questions presented for discussion by the case stated, and examining the authorities cited as well as some others, and weighing the arguments of the counsel on both sides, who certainly discussed this case with great ability, our conclusion is: that when a bank note is given *bona fide* and received without objection, in exchange for goods, money, notes, or bills; or on general deposit by a bank, and there is no agreement or understanding, express or implied between the parties, as to which of them shall stand the risk of the then or future solvency of the bank issuing such note; the party thus receiving such note assumes all the risk of its solvency, and is without remedy against the person from whom he thus received it, although it may afterwards appear that the bank issuing such note, had at the time of the transaction failed.

It is not pretended in this case that there was any express agreement or understanding between the parties that the solvency of the bank notes deposited, was to be at the risk of the plaintiff: the only circumstance relied on to show that such agreement or understanding is to be implied, is the mere fact, that the defendants received those notes from the plaintiff as cash, and that on the morning of the day they were so received, the bank of Maryland had closed its doors, being then insolvent: a circumstance equally unknown to both the parties at the time of the deposit. The law will not imply such agreement from the mere fact of insolvency.

Are there not, however, some circumstances, some intrinsic evidence, arising from the nature and course of the transaction between these parties, from which an agreement or understanding directly to the contrary might fairly and legitimately be implied? The plaintiff in his letter to Mr. Spruance inclosing the notes, and which was laid before the cashier, shows an anxiety to get rid of these notes and to be free from responsi-

bility concerning them. He had received them on that day; sends them forthwith to the bank, and urges an answer by the mail of the following day, that he may make some other arrangement, if the bank of Smyrna should decline taking them on deposit. In his letter he intimates a doubt whether, under ordinary circumstances, the bank would receive Baltimore notes. Why this doubt, if the notes of the banks in Baltimore were above all doubt or suspicion? Do not the banks of this state at all times eagerly lay hold of the bank notes of the neighboring cities of Philadelphia and Baltimore, whose credit is not questioned?

In order to obviate this apprehended difficulty, he proposes to the bank, that if it will receive the notes transmitted and credit him with their amount, the sum thus credited may remain on deposit for one year, or until a certain suit between George Houston and the assignees of David Wilson is decided. Why this unusual feature in this deposit? why give the bank the use of the sum deposited for at least one year, to remain undrawn for a year, the plaintiff not to be at liberty to use his deposit for such a length of time, nor to receive any interest for it? why give the bank a premium of not less than six per cent. for taking these notes? why give the bank what was equivalent to more than one hundred dollars? for by loaning or discounting on them (had they proved solvent) for the period the credit was to remain untouched, a profit to this extent could have been realized. For all this was there to be no consideration on the part of the bank? was the plaintiff to be restricted from touching his deposit for a year, and also to be held as guaranteeing the solvency of the notes? In making his proposition not to draw the money for a year, he must have had some object in view, and the bank must have so understood him: we can not suppose that the mere transmission of the notes to Baltimore, and the receiving cash for them, could have been the object of the plaintiff, or the consideration expected from the bank for permitting the deposit to remain; for this could have been done by the plaintiff sending a messenger to Baltimore at an expense not exceeding probably ten dollars; and yet the bank was offered what was equal to one hundred dollars. Is it not, therefore, the reasonable and fair inference from these facts, that the design of the plaintiff in making his proposition was to be relieved from all responsibility in relation to these notes, and to effect this, tendered the credit on the deposit; and that the defendants must have so understood him when they accepted

his offer, and by accepting it became bound by that implied understanding or agreement?

In a case like that before us, the law implies that the bank took the notes at its own risk, no agreement or understanding, express or implied, being established to the contrary. The facts in this case would also lead us to infer that such was the understanding of the parties: but at all events, these facts do not lead us to the belief or conclusion that there was between the parties at the time the transaction took place, any agreement or understanding, express or implied, that there was to be any responsibility on the part of the plaintiff for the then or future solvency of these notes. There is not a single fact or circumstance in the case stated to bring the mind to such conclusion; and the case, therefore, is to be governed by the principle of law which has been established in relation to notes given at the time the contract is made.

There is another view of this case, on which it might be decided on principles well settled. The solvency of bank notes or the notes of individuals may, by agreement, be assumed either by the party paying or the party receiving them: admit, for the argument, that the solvency of the bank notes in question was distinctly assumed by the plaintiff. When the failure of the bank of Maryland became known to the defendants, what was their incumbent duty; what does the law require to be done in like cases by the person receiving such notes, to enable him to resort to the person passing the note? Why, it requires the holder to give reasonable notice of the insolvency of the maker of the note, to the person from whom he received it, or that person will be discharged in law from the responsibility he assumed: *Tindall v. Brown*, 1 T. R. 167; *Camidge v. Allenby*, 13 Com. L. 175; 1 Wash. C. C. 156;¹ *Byles on Bills*, 163.

It has been thought in some cases, that the notice should go further and apprise the party that the holder looks to him for payment of the note. We doubt if this be essential, as it might be properly inferred from the notice: See *Bank of U. S. v. Carneal*, 2 Pet. 553. Knowledge is not notice. Legal notice is required. To be legal it must be given by a party to the instrument or his agent, or by one through or to whose hands it has passed: *Stewart v. Kennell*, 2 Camp. 177; *Byles on Bills*, 163; *Ex parte Barclay*, 7 Ves. 597; *Chit. on Bills*, 225, 226; *Tindall v. Brown*, 1 T. R. 167; 3 Kent Com. 93, 104, 108, 110. There must be positive proof of the fact of notice, not probable evi-

1. *Roberts v. Gallagher*.

dence. The *onus probandi* lies on the party holding the note; he must show that notice was given and in due time: *Lawson v. Sherwood*, 1 Stark. Cas. 314. The plaintiff in this case may have acquired a knowledge of the failure of the bank of Maryland as early as the officers of the Smyrna bank, and in the same way; but such knowledge or any other knowledge of this fact, unless communicated by the bank or its agents, is not enough. The law requires that notice of the fact of insolvency be given by the holder, in order that the person from whom the note was received, and who was the guarantor of its solvency, may be apprised that the holder stands on his legal rights, and looks to him for payment.

It does not appear from anything in the case stated, that notice of the insolvency of the bank of Maryland was ever given to the plaintiff by the defendants. The only notice stated to have been given was that contained in the letter of the cashier of the twenty-seventh of March, which merely apprised the plaintiff that the money passed to his credit on the twenty-fifth of March, "is received as a special deposit," and that the notes would be kept by themselves subject to his order. This is no notice of the "insolvency" or stoppage of the bank of Maryland, but merely notice that the bank had arbitrarily done what the plaintiff knew they had no right to do, and might well disregard as not being an act that could affect his rights. If the plaintiff assumed the responsibility of the solvency of these notes, the bank had the right in the event of the failure of the bank of Maryland, to call on him to make good their loss. This was their legal right and all their right, and was to be enforced according to the rules the law has prescribed; one of which imperatively demands that notice of the insolvency be given or else the liability is discharged. It did not necessarily follow, because the bank had changed the deposit from a general to a special one, that it was done in consequence of the bank of Maryland or the bank of Messrs. Cohens having failed. No such reason nor intimation of such fact is given in the letter addressed by the cashier to the plaintiff; nay, the latter bank had not failed, nor has it since failed. The plaintiff might have inferred from the notice, that the banks whose notes he had deposited, had stopped payment; but it would have been only an inference, and a wrong one too as to one of those banks, that of Cohens. Direct and explicit notice of the failure or insolvency of the bank of Maryland should have been given on the part of the defendants to the

plaintiff to fix his liability for the insolvency of its notes which he had deposited, even if he had assumed their solvency, and this not having been given by the bank, it has been guilty of such laches as, according to the settled principles of law, discharges the plaintiff from responsibility for the solvency of the notes in question.

One question remains to be disposed of. It is contended by the defendants' counsel, that there is no sufficient consideration to support the present action, as the bank of Maryland had failed before the deposit was made, and its notes were then of no value.

Whether the receipt by the Smyrna bank of these notes, in the manner they were received and credited, is a sufficient consideration to maintain this suit, depends upon the determination of the question, on which of the parties did the responsibility of the solvency of these notes rest. If it rested upon the plaintiff, then there is not a sufficient consideration for this action. But if it rested on the defendants, then there is a sufficient consideration. If in law these notes are to be considered as having been taken at the risk of the bank, or if they are to be held as taken at the risk of the plaintiff, and the defendants by their laches have discharged him from that responsibility, then there arose a legal obligation upon the bank to pay the plaintiff the amount of the deposit. A legal obligation to do a thing is a sufficient consideration for a promise to do it: 2 Kent Com. 465. The law having established the obligation to pay, a promise to make the payment would necessarily be implied. The law never imposes an obligation or legal duty to do an act unless there exists a sufficient consideration for it. In our judgment the risk of the solvency of the notes of the bank of Maryland rested, according to established legal principles, upon the defendants; and those principles imposed upon the defendants, as a consequence of the deposit accepted by them, an obligation or legal duty to pay the plaintiff the amount of the notes thus taken by them as cash and give to the plaintiff a legal right to recover such amount. It necessarily follows, therefore, that there exists a sufficient consideration for such recovery; for otherwise the duty or obligation to make such payment would not have been created by law.

The deposit of a check to the credit of a person was held in the case of *Bollon v. Richard*, 6 T. R. 139, to be equivalent to the transfer of so much money in the hands of the person receiving the deposit to the credit of the person making the deposit.

In the case of the *Bank of Kentucky v. Wistar*, 2 Pet. 318, a deposit in that bank of the notes of the bank which were at the time passing in the country at one half of their nominal amount, entered generally to the credit of the person for whose benefit the deposit was made, and not as a special deposit, was considered by the supreme court of the United States as equivalent to depositing so much gold or silver. In the case before us, the deposit was not a special one, but general, as so much cash. We, therefore, adopt the language used by Justice Story in the suit by the *Bank of the United States v. The Bank of Georgia*, reported in 10 Wheat. 333: "Considering, then, the credit in this case as a payment of the notes, the question arises whether after a payment the defendants would be permitted to recover the money back; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit."

With the views which we entertain of the law applicable to the case before us, the defendants could not, under the circumstances of it, have recovered back from the plaintiff the amount of the notes in question, even had they paid the same in coin to the plaintiff, instead of receiving them as they did from him on general deposit; and therefore, the plaintiff is entitled to a recovery in the present suit of the amount with which he was credited on the books of the bank at the time the notes were deposited. In answer to the argument which was urged on this point by the defendants' counsel, and to support the view we have taken of it, we would refer to the three cases last cited; and also to that of *Levy v. The Bank of the United States*, reported in 1 Binn. 27, and in 4 Dall. 234.

It is, therefore, the opinion of a majority of the court:

1. That there is no evidence, direct or circumstantial, disclosed to us in the case stated, to lead us to the conclusion that there was between the parties to this cause at the time of the deposit made by the plaintiff in the bank of Smyrna, of the bank notes in controversy, any agreement or understanding, express or implied, that the plaintiff was to be answerable to the defendants for the solvency of the notes deposited.
2. That the facts set forth in the case stated are such as to lead to the belief or inference that the defendants, when they received those notes, did so with the understanding that they received them as so much coin, and that they voluntarily took upon themselves the risk of the solvency of the notes.
3. That in the absence of evidence of any agreement or un-

derstanding express or implied, those bank notes, according to the well-established principles of law, are to be considered as having been received by the bank of Smyrna as money at its own risk, and that the plaintiff is not responsible either for the then or future solvency of those notes; they not having been deposited to discharge any pre-existing debt, but parted with on deposit and to obtain a credit in the bank to be futuramente used by the plaintiff.

4. That even if they had been taken by the bank of Smyrna at the express risk of the plaintiff as to their solvency, his liability was discharged by the laches of the bank in not giving him due and distinct notice of the insolvency or failure of the bank of Maryland.

5. That the risk of the solvency of these notes being fixed upon the defendants by settled legal principles, a legal obligation attached to them to pay to the plaintiff the amount credited to him on the books of the bank at the time of the deposit, and that there is therefore a sufficient consideration to support the present action; and that judgment should be entered for the plaintiff for the whole amount deposited by him.

Layton, J., dissented. Recovery in an action of assumpsit for money had and received, he considered could not be had, where no claim existed in favor of plaintiff, either in equity or in conscience, to the funds in the hands of defendant. It was also clear, he thought, that upon principles of justice and honesty, he who parted with value should receive value, and that he who should receive value, should give it in return. In this case no value had been given for that which it was now sought to recover, and he could see no greater reason to imply a promise on part of defendant to pay plaintiff the face amount of the bills deposited, than would exist had plaintiff deposited forged bills. He repudiated the distinction taken between those cases where such notes as those in question were taken in payment of precedent debts, and those where they were paid out upon a cotemporaneous contract, and attempted to show by a review of the cases, that in all cases where such notes had been held by the courts a good discharge of the contract upon which they had been paid, evidence of a special agreement between the parties existed. Judge Layton admitted that it was the duty of the bank to have given notice to its depositor of the insolvency of the Maryland bank, as soon as this was discovered, but thought the point not one arising here, for the failure to give such notice did not appear from the case stated. In his argument, Judge Layton relied mainly upon the case of *Ontario Bank v. Lightbody*, 27 Am. Dec. 179.

EFFECT OF PAYMENT IN NOTES OF AN INSOLVENT BANK: *Ontario Bank v. Lightbody*, 27 Am. Dec. 179 and note 188, and *Lowrey v. Murrell*, Id. 651.

C A S E S
IN THE
SUPREME COURT
OF
ILLINOIS.

GARRETT v. DOE EX DEM. WIGGINS.

[1 SCAMMON, 335.]

RETROSPECTIVE OPERATION WILL NOT BE GIVEN A STATUTE without a clearly expressed intention of the legislature.

VALIDITY OF A TAX DEED is governed by the law in effect at the time of the sale, though this has been altered before the execution of the deed, where in the statute working the change, no words are to be found extending its operation to prior sales.

PREREQUISITES TO A VALID TAX SALE must be strictly proved in ejectment upon a tax deed; unless the necessity of the proof has been dispensed with by statute.

EJECTMENT. The opinion states the case.

W. B. Scates, for the plaintiff in error.

H. Eddy and W. J. Gatewood, *contra*.

By Court, **WILSON, C. J.** This was an action of ejectment brought by Wiggins against Garrett, to recover the possession of a tract of land which was sold to him by the auditor of public accounts, as the property of Garrett for the non-payment of taxes. On the trial, Wiggins adduced in support of his title, a deed from the auditor, executed in the form prescribed by law, and upon this evidence of title, submitted his cause. The defendant's counsel then moved the court for several instructions as to the law applicable to the case, and the insufficiency of the plaintiff's evidence of title; all of which the court refused, and upon motion of the plaintiff's counsel, gave instructions directly opposite to those asked for by the defendant, as follows:

1. That the statute in force at the time of the execution of the auditor's deed, and not that which was in force at the time of sale, was the one applicable to the case.

2. That the auditor's deed is evidence of the regularity and legality of the sale, and in the absence of proof of any other title, the jury must find for the plaintiff, Wiggins.

These instructions were excepted to by the defendant on the trial, and are now assigned for error. Some other errors were also assigned, which it is considered unnecessary to notice. In order to understand the effect of the first branch of the instructions given by the court, it is necessary to recur to the order of time in which the different acts connected with the plaintiff's title were performed, and also to the different legislative provisions upon the subject.

The sale to Wiggins was made on the seventeenth day of January, 1829; but the deed was not executed till 1831, after the revenue law of 1829, which had repealed that of 1827, had gone into operation. This last statute is essentially different from the preceding one, upon the same subject, and it is contended, dispenses with proof on the part of the purchaser at an auditor's sale, of the prerequisites of the statute. But we are not called upon in this case to give a construction to that statute, as I am clearly of opinion that it is not applicable to this case. Without the clearly-expressed intention of the legislature, courts will not give to a law a retrospective operation, even where they might do so without a violation of the paramount law of the constitution; but no such intention can be collected from the law of 1829. Its language and objects are prospective. It relates only to contracts and proceedings under its provisions, and can not by a fair construction be so extended as to interfere with, or impair, prior contracts, rights, or obligations. The fact of the deeds not having been executed till after the statute of 1829 went into operation, has no influence upon the character of the transaction.

The statute under which the sale was made, gave to the purchaser, at his option, the privilege of demanding from the auditor a deed immediately, or of taking a certificate of purchase, and waiting for his deed till the expiration of two years. In either case the form of the deed was the same; either would contain the same reservation in favor of the right of redemption, which by the law was two years, where the owner was of age, and in the case of an infant, one year after he became of age. If the purchaser, Wiggins, had demanded and received

his deed at the time of sale, I presume it would not be contended that a subsequent law would change its effect and operation. Upon what principle, then, can his situation be different from that of other individuals who purchased at the same time and upon the same terms, but whose deeds were executed earlier? They certainly are all upon the same footing. The auditor's sale constituted a contract between the state and the purchaser, which in connection with the then existing law, determined the rights and obligations of the parties. The certificate of purchase in the one instance, and the deed in the other, are but the evidence of the contract, and that must be construed with reference to the law in force at the time it was entered into. A different rule would substitute the varying will of after legislatures, for the intention and stipulations of contracting parties. The statute of 1827, then, being the law applicable to this case, its construction presents the next point for consideration. It is a settled principle of the common law, that a party, claiming title under a summary and extraordinary proceeding, must show that all the indispensable preliminaries to a valid sale, which the law has prescribed, in order to give notice to those interested, and to guard against fraud, have been complied with, or the conveyance to him will pass no title. The auditor's authority to make the sale under which the plaintiff claims title is one of this class. It is therefore incumbent upon him to prove that all the prerequisites to a legal exercise of that power, have preceded it, or he must show that the statute under which the auditor acted, has dispensed with the proof of those prerequisites, or inferred them from the deed of conveyance. In examining the law conferring the authority, and prescribing the manner of selling the land of non-residents, for the non-payment of taxes, it will be perceived that the tax upon land is required to be paid by the first day of August annually, and that the auditor is required as soon thereafter as practicable, to make out and publish a descriptive list of all lands upon which taxes are due, after which he is required, at the time and place specified, to "sell all the lands advertised as aforesaid, on which the taxes and costs shall remain unpaid." The purchaser at this sale, shall, at his option, be entitled to receive a certificate of purchase or a deed, "which deed (the laws says) shall vest in the purchaser a perfect title, unless the land shall be redeemed according to law, or the former owner shall show that the taxes, for which it was sold, had been paid

as required by law, or that the land was not legally subject to taxation."

This act will not, by any fair construction, warrant the opinion that the auditor, selling land without authority, could by his conveyance, transfer the title of the rightful owner. It is admitted that it is competent for the law-making power to change the rule of evidence, and declare, by an arbitrary rule, that from the proof of certain facts, others shall be presumed. This statute has done so to some extent. Under it several preliminary facts to a legal sale by the auditor, are inferred from his conveyance, and the responsibility of proof shifted from the purchaser to the original owner. But the publication of notice of sale by the auditor as required by law, is not one of those facts inferred from his deed, nor is the proof thereof thrown upon the former owner. The duty of the auditor to publish this notice is imperative; his authority to sell is limited by the express words of the law to "the land advertised as aforesaid," and as the rule of law which required the purchaser to show the performance of this prerequisite, was not changed by the act of 1827, he should therefore have adduced evidence to that effect. Without proof of this fact, the auditor's deed was not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser, Wiggins, who was the plaintiff below.

The decision of the circuit court is therefore reversed with costs, the cause remanded to that court, with directions for a *venire de novo*, and that the cause be tried conformably to this opinion.

Judgment reversed.

Cited to the point that before the court shall construe a statute to retroact, the intention must be clearly expressed: *Hatcher v. Toledo etc. R. R. Co.*, 62 Ill. 480; *In re Tuller*, 79 Id. 107; *Knight v. Begole*, 56 Id. 124. That a party claiming under a tax deed must show a strict compliance with the prerequisites of the statute: *Goewey v. Wrig*, 18 Id. 242; *Williams v. Underhill*, 58 Id. 138; *Irving v. Brownell*, 11 Id. 411; *Graves v. Bruen*, Id. 438; *Edwards v. Helm*, 4 Scam. 142. In *McClure v. Engelhardt*, 7 Ill. 50, it was cited to the point, that after the expiration of the period of redemption, the judgment debtor no longer had any interest in the property sold.

PURCHASER OF LANDS SOLD FOR TAXES must show a strict compliance with the requisites for an exercise of the power: *Jackson v. Shepard*, 17 Am. Dec. 502.

POWER OF LEGISLATURE to make tax deed evidence against the owner: See same case, note.

BUTTERFIELD v. KINZIE.

[1 SCAMMON, 445.]

IN SUING UPON A NOTE OR BILL PAYABLE AT A SPECIFIED PLACE, it is not necessary to either aver or prove a demand at the time and place specified.

THE opinion states the case.

J. Butterfield and J. H. Collins, for the plaintiff in error.

J. Grant, *contra*.

By Court, WILSON, C. J. The only question presented for adjudication by the record in this cause is, whether or not, in an action against the maker of a promissory note, or the acceptor of a bill, payable at a specified place, the plaintiff is bound to aver and prove a demand of payment at the time and place specified, to maintain the action. The negative of this proposition is maintained by the plaintiff in error, and the affirmative by the defendant. Without going into an examination of the numerous decisions bearing upon the question, or the reasons advanced in support of those decisions, this court has no hesitation in saying, that the weight and current of authorities fully sustain the position assumed by the plaintiff: 17 Johns. 248;¹ 4 Id. 183;² 11 Wheat. 171;³ 6 Pet. Cond. 257; 1 Camp. N. P. 423;⁴ 2 Id. 498;⁵ 8 Cow. 271;⁶ 3 Wend. 1;⁷ Bail. on Bills, 203; 4 Litt. 225.⁸

It is not a question of first impression, but one which has been so repeatedly decided, that this court does not feel itself called upon to examine the reasons upon which former decisions have been maintained. The circuit court having decided in favor of the defendant, the decision must be reversed, and the cause remanded, with directions to that court to overrule the demurrer, and proceed to a trial of the cause upon its merits.

Judgment reversed.

LOCKWOOD and SMITH, JJ., absent.

Cited to the effect that no demand at the place of payment specified in the note, is necessary to perfect the cause of action on it: *Armstrong v. Caldwell*, 1 Scam. 546; *New Hope Delaware Bridge Co. v. Perry*, 11 Ill. 471; *Hunt v. Divine*, 37 Id. 144; *Wood v. Merchants' Saving etc. Co.*, 41 Id. 270; *Yeaton v. Berney*, 62 Id. 63.

NOTE MADE PAYABLE AT A PARTICULAR PLACE: *Washington v. Planters' Bank*, 28 Am. Dec. 333, and note 335.

1. *Welcott v. Van Santvoord*.

2. *Foden v. Sharp*.

3. *Bank of the United States v. Smith*.

4. *Lyon v. Sundius*.

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5. *Nicholls v. Bowes*.

6. *Caldwell v. Casidy*.

7. *Haston v. Bishop*, 3 Wend. 13.

8. *Bank of Kentucky v. Hickey*.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

RASOR v. QUALLS.

[4 BLACKFORD, 286.]

PLEA THAT ENTRY WAS BY LICENSE OF THE REAL OWNER is good to trespass for breaking a close and carrying off the grain.

MATTER IN AGGRAVATION need not be noticed in a plea.

THE GENERAL ISSUE IN TRESPASS will allow proof that the breaking the close complained of was by license of the real owner.

A PRE-EMPTOR PLANTING A CROP which matures after his pre-emption right expires, because of his failure to purchase during the time allowed him by law, may be dispossessed of it by one who, after the expiration of the right, purchases from the government.

TRESPASS. The opinion states the case.

J. Ryman, for the appellant.

G. Holland, *contra*.

BLACKFORD, J. Trespass *quare clausum fregit*, brought by George Rasor against Nicholas Qualls. There are two counts in the declaration. The first is for breaking the plaintiff's close in August, 1836, and taking and carrying away a certain quantity of his grain. The second count is for forcibly taking and carrying away a certain quantity of other grain belonging to the plaintiff.

The defendant pleaded the general issue. He also pleaded in bar to the first count the following special plea, viz: that the close in that count mentioned now is, and at the time when, etc., was, the soil and freehold of one John M. Qualls; and that the defendant on, etc., by the license of the said John M. Qualls, broke and entered the close, and took and carried away the grain; which is the same trespass, etc. The special plea

was demurred to, but the demurrer was overruled. No formal judgment was rendered on the demurrer, and the parties went to trial on the general issue to the whole declaration. After the evidence was closed, the court instructed the jury as follows: That if it was proved that the plaintiff had a pre-emption right to the premises, which expired in June, 1836; that the crop which was sued for was put in during the existence of that right, and was unripe and growing when the right expired; and that the defendant, after the expiration of this pre-emption right, bought the land of the United States and took the growing crop—the crop belonged to the defendant, and the jury ought to find in his favor. A verdict was found for the defendant, and there was a judgment accordingly. The first question submitted by the parties is, was the special plea to the first count valid? That question we decide in the affirmative. The ground of action contained in the first count, is the breaking and entering the plaintiff's close. The taking away the grain mentioned in that count, belongs to the description of the trespass, and is only laid by way of aggravation. It was not necessary that the plea should notice this matter of aggravation, as appears by the following cases: in trespass for breaking and entering the plaintiff's house, debauching his daughter, and getting her with child, *per quod servitium amisit*, if the defendant can justify the entering of the house, he defeats the action: *Bennell v. Allcott*, 2 T. R. 166. So, in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, a justification of the breaking and entering the house is a bar to the suit: *Taylor v. Cole*, 3 T. R. 292.

It is therefore settled, that all the defendant had to show in answer to the first count, was, that he had a right to enter on the premises; and we are next to inquire whether that right is shown by the plea. It is decided, that a person having the freehold and a right to the possession, may enter on the close even by force, without subjecting himself to an action of trespass by the party in possession: *Taunton v. Costar*, 7 T. R. 427; *Butcher v. Butcher*, 7 Barn. & Cress. 399. And any person, by virtue of an authority from such owner, may do the same. There is, indeed, a decision in point to show, that proof that the freehold was in a third person, and that the defendant entered under his authority, is a good defense to a charge of breaking the close: *Diersly and Nevel's case*, 1 Leon. 301. This case in Leonard is cited in Gilbert's Evidence, p. 255, and is approved by Justice Lawrence in *Argent v. Durrant*, 8 T. R. 405.

These authorities prove, that the facts contained in this special plea are an answer to the charge in the first count of breaking the plaintiff's close; and they must consequently be considered a sufficient answer to that count. The defendant had his choice to plead these facts specially, or to give them in evidence under the general issue: 1 Chit. Pl. 538, 541.

The second question in the cause is—were the instructions to the jury correct? This question must also be decided in the affirmative. The act of congress of 1834, which revives a previous law granting pre-emption rights to settlers on the public lands, is the act under which the plaintiff's right of pre-emption was claimed. That act expired by its own limitation, on the nineteenth of June, 1836; Acts of Congress, 1834, 28. The plaintiff therefore knew when he planted in 1836, whether the crop could ripen or not before his pre-emption right must expire; and his claim to the crop in question may be tested by the rule that regulates the claim, which a lessee for a certain term of years has to the emblements that are growing when his lease expires. The law has always been, that if such a lessee for years, in the last year of his term, sow a crop, and it be not ripe and cut before the expiration of the term, the landlord is entitled to the crop. It was the tenant's own folly, say the books, to sow when he knew with certainty that his lease would be at an end before the time of harvest: 2 Bl. Com. 145; 4 Kent Com. 109. So, it may be said here with the same propriety, that it was the plaintiff's folly to plant the crop in question, when he knew that his pre-emption right must expire before the crop could be ripe. According to the facts assumed in the instructions to the jury, the opinion of the circuit court is correct, that the crop mentioned in the declaration belonged to the purchaser of the land.

By COURT. The judgment is affirmed with costs. To be certified, etc.

GENERAL ISSUE IN TRESPASS *quare clausum fregit* will not admit evidence to show that defendant's act, *prima facie* a trespass, was authorized by plaintiff: *Finch v. Alston*, 23 Id. 299. That under this plea, evidence of the title of a person under whom defendant claims, may be proved, see same case.

RIGHTS OF PRE-EMPTOR before full compliance with requisites of the law—*Henry v. Welch*, Id. 490, and note 492.

STATE v. MEAD.

[4 BLACKFORD, 309.]

WAIVER OF TRIAL BY JURY in a criminal case, can only be upon the consent of both the prisoner and the state.

TRIAL AND ACQUITTAL OF A CRIMINAL by the court sitting without a jury, is not available under the plea of *autrefois acquit*, upon a second trial for the same offense, where upon the first trial the state had insisted upon a jury.

INDICTMENT for larceny. The opinion states the case.

W. Herod, for the state.

O. O. Nave, *contra*.

BLACKFORD, J. Indictment for larceny. Plea, not guilty. When the cause was called for trial, the defendant claimed the right to have the cause tried by the court, and not by a jury. The prosecuting attorney, on behalf of the state, objected to this claim, and insisted upon having a jury impaneled to try the issue. The court overruled the objection of the prosecuting attorney, tried the cause upon its merits without a jury, and acquitted the defendant. We have no doubt but that this proceeding is unconstitutional and void. The language of the constitution of the state is: "That in all criminal cases, except in petit misdemeanors, etc., the right of trial by jury shall remain inviolate:" Art. 1, sec. 5. The state is as much entitled to the benefit of this constitutional provision as any individual can be. Whenever the right is claimed by either party, in a case like the one before us, the court is bound to grant it. The statute authorizing suits, whether civil or criminal, to be submitted to the court without a jury, can have no application to this case: Rev. Code, 1831, 408; because the state, instead of agreeing to a trial by the court, objected to it in express terms.

The defendant supposes that because he has been acquitted, the state can not subject him to another trial for the same cause. That would be true, if the objection of the state were to a verdict, and the insufficiency of the evidence were the ground of the objection: *Rex v. Praed*, 4 Burr. 2257. But this is a very different case. Here is no verdict, and the objection to the judgment is, that there has been no legal trial. The court had no authority, under the circumstances, to determine the issue, and the trial is *coram non judice*, and absolutely void. The plea of *autrefois acquit* is no bar to a prosecution, if the former

indictment was insufficient: *Vaux's case*, 4 Co. 44. The reason is, because the defendant, in such a case, was not *legitimo modo acquielatus*. For the same reason, the defendant, in the present case, may be tried again. Our constitution, it is true, provides that no person shall be twice put in jeopardy for the same offense: Ind. Const., art. 1, sec. 13. But that provision does not apply to a case where the first trial was a nullity, and where the defendant, of course, was not put in jeopardy by it. There has here been a mistrial, and though the defendant has been acquitted, there must be another trial of the cause.

By COURT. The judgment is reversed, with costs. Cause remanded, etc.

HARNEY v. OWEN.

[4 BLACKFORD, 337.]

ARTICLES OF APPRENTICESHIP are not binding upon a minor, unless approved by either a parent or guardian.

RESCISSION BY A MINOR of a fair and equitable contract into which he had entered, will prevent him from recovering the value of the services performed under the contract prior to its rescission.

ASSUMPSIT. The opinion states the case.

J. Perry, for the plaintiff

O. H. Smith, contra.

DEWEY, J. Assumpsit for work and labor. The cause was tried by the circuit court upon an agreed case. Judgment for the defendant. The facts are these: The plaintiff and defendant entered into a contract under seal, by which the plaintiff bound himself as an apprentice to the defendant, and agreed to serve him until full age. The defendant covenanted to board, clothe, and instruct, etc., the plaintiff, and at the end of his term of service to give him property to the amount of sixty dollars. At the time of making the contract the plaintiff was, and still is, a minor, without either parent or guardian; he served the defendant under the contract eight and a half months, and then left his service without his knowledge or consent, and commenced this suit for his labor. The services rendered by him were worth fifty dollars, and he received thirty-one dollars in necessities of the defendant, while he lived with him. We have no difficulty in deciding, that articles of apprenticeship entered into by a minor are not binding upon him at common law; and it is equally clear, that the contract in this case is not

obligatory upon the plaintiff under the statute of this state, for the want of the sanction of a parent or guardian. It is such a contract as the minor had a right to disaffirm at his pleasure. This right has been exercised by his abandonment of the service of his master, and by commencing this action for his work. But whether, having thus rescinded the contract, he is entitled to recover for services rendered under it, upon an implied assumption, is a question with regard to which the decisions of courts have not been uniform. We believe the sounder principle, and the preponderance of authority to be, that, when a minor enters into a contract, apparently to his advantage, and which has been obtained from him fairly, without any attempt to mislead his judgment, or to impose upon his inexperience, and he chooses to rescind it after having received in part, or in full, the consideration stipulated by the contract, he does not thereby acquire the right of sustaining an action for what he may have advanced under it, whether such advance be in labor, property, or money; and that to suffer him to do so, would be enabling him to practice upon others that fraud and imposition, against which his privilege of infancy was designed to protect himself—that it would be placing in his hands “a sword and not a shield:” *Badger v. Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; 2 Kent Com. 240, 2d ed.; *Holmes v. Blogg*, 8 Taunt. 508; *McCoy v. Huffman*, 8 Cow. 84; *Weeks v. Leighton*, 5 N. H. 343; *Stone v. Dennison*, 13 Pick. 1 [23 Am. Dec. 654].

The contract in the record was evidently advantageous to the minor. It provided for his necessities whether he should be able to labor or not, and guarded his morals by securing to him instruction in a useful occupation. That the services rendered by him happened to exceed in value the articles with which he had been furnished at the time he saw fit to disaffirm the contract, did not change its beneficial character. And there is no pretense that it was procured by undue means.

By Court. The judgment is affirmed. The costs to be paid by the *prochein ami*. To be certified, etc

CONTRACT OF AN INFANT once performed becomes binding, if in its inception it was fair and reasonable upon both parties; and the infant can not recover upon a *quantum meruit* by showing that his services performed under the contract were of greater value than his compensation: *Stone v. Dennison*, 23 Am. Dec. 654, and note 659.

CASE v. WINSHIP.

[4 BLACKFORD, 425.]

MORTGAGEE OF PERSONAL PROPERTY is entitled to its immediate possession. PAROL EVIDENCE IS INADMISSIBLE to prove an understanding between the parties to a mortgage of personal property, that its possession should remain with the mortgagor.

REPLEVIN. The opinion states the case.

J. Ryman, for the plaintiff.

G. Holland, *contra*.

SULLIVAN, J. This is an action of replevin. The declaration charges the defendant, Case, with taking and unlawfully detaining certain goods and chattels, the property of the plaintiff. The defendant pleads property in himself. Replication and issue. The cause was tried by a jury, who found a verdict for the plaintiff, on which judgment was rendered by the court.

It appears from a bill of exceptions filed in the cause, that the defendant below and one Henry Case were indebted to the plaintiff in three several notes of hand, for fifty dollars and fourteen cents each, payable in six, twelve, and eighteen months, dated the seventh of September, 1836; and that on the twenty-first of September, the defendant and H. Case did, by their certain deed, bargain and sell to the plaintiff below, the goods and chattels named and described in the plaintiff's declaration, to have and to hold the same to said Winship, his heirs and assigns forever. To this grant there was a condition, setting forth that if the grantors, their executors, etc., should well and truly pay to said Winship the full amount of the notes, etc., as they should fall due, then the conveyance was to be void. The plaintiff below founded his right to the possession of the property on the above-named mortgage-deed. On the trial in the circuit court, the defendant offered to prove by parol evidence, that it was the understanding of the parties at the time of the execution of said instrument, that the property mortgaged should remain in the possession of the defendant until forfeiture, but the court would not permit the testimony to be given; to which opinion of the court, the defendant excepted, etc.

The plaintiff in error insists: 1. That the mortgagee is not entitled to the possession of the property until after forfeiture; and, 2. That the circuit court erred in not admitting parol testimony to explain the understanding of the parties at the time of the execution of the mortgage. It has been repeatedly

decided by the courts, that if a man makes an absolute sale of goods, and continues in possession of them as visible owner, with the consent of the buyer, the sale is *prima facie* fraudulent as to creditors. The case of a mortgage of goods forms no exception to the general rule.

A reason why possession must accompany and follow the deed is, that retaining the property by the vendor enables him to impose upon mankind by false appearances. This reason applies with as much force to a mortgage of goods when possession is not delivered, as it does to an absolute sale. In *Ryall v. Rowles*, 1 Ves. sen. 348; S. C., 1 Atk. 170, it is held that a pawn is not complete until delivery; but that on a conditional or absolute sale, the sale is complete by the contract, and the party is entitled to a delivery of the goods as soon as he has paid the price. As between the mortgagor and mortgagee, a delivery is perhaps not essential to the validity of the mortgage, but this in no wise proves, that the mortgagee is not entitled to the possession of the property, if he demand it. He acquires by the mortgage a special property in the goods, and may detain them for his security. If not redeemed according to the contract, his right becomes absolute. In 2 Kent Com., 3d ed., 515 *et seq.*, the author sums up the doctrine on this subject; and the conclusion to be drawn from it is, that a vendee in the case of an absolute sale, and a mortgagee in the case of a mortgage, are each entitled to the immediate possession of the property sold or mortgaged.

On the second point made by the plaintiff in error, we conceive the law to be well settled. The circuit court did not err in refusing to admit parol testimony to explain the understanding of the parties at the time of making the mortgage. Parol testimony will not be admitted to vary or add to, extend or limit, the terms of an agreement in writing. Nothing, says Lord Thurlow, in 4 Bro. C. C. 519,¹ can be added to a written agreement, unless there be a clear, subsequent, independent agreement varying the former; but not where it is matter passing at the same time with the written agreement. Where a written agreement for the sale of goods is silent as to the time of delivery, the law implies a contract to deliver them within a reasonable time, and in such case evidence is inadmissible of a contemporaneous oral contract by the purchaser to take them away immediately: *Greaves v. Ashlin*, 3 Camp. 426. In *Colman v. Packard*, 16 Mass. 39, the court decided, that parol evidence

1. *Rich v. Jackson*.

was not admissible to prove that, at the time of making the mortgage, it was agreed that the mortgagor should continue in possession until he should fail to perform the condition of the mortgage. Numerous cases might be cited illustrating and enforcing this principle, all of which show that the decision of the circuit court in this case is correct. It is to be presumed that the parties in expressing their intention, expressed the whole of it; and we can not permit their intention to be changed by the operation of parol testimony.

By Court. The judgment is affirmed with costs. To be certified, etc.

As to necessity of possession of personal property by mortgagee, see *Thornston v. Davenport*, 29 Am. Dec. 358 and note.

DOE, ON THE DEMISE OF MAXWELL, v. MOORE.

[4 BLACKFORD, 445.]

DECLARATIONS OF A JUDGMENT DEBTOR after a sale of property under execution against him, that the title of the property at the time of the sale was not in him, are inadmissible in evidence against the execution purchaser.

EJECTMENT. The opinion states the case.

A. S. White and R. A. Lockwood, for the appellant.

I. Naylor, contra.

SULLIVAN, J. This is an action of ejectment brought for the recovery of one hundred and twenty acres of land lying in the county of Fountain. Plea, not guilty. On the trial in the circuit court, the plaintiff introduced in evidence a deed from the defendant, Charles L. Moore, to James Maxwell and John H. McCormick for the premises named in the plaintiff's declaration, dated the twentieth of August, 1833; the record of a judgment of the Fountain circuit court in favor of one Sawyer, against said James Maxwell and John H. McCormick, rendered at the March term, 1834, for the sum of three hundred and twenty-five dollars and fifty cents; the execution issued on the judgment, and the levy and sale of the land described in the declaration indorsed thereon; also a deed for the land from the sheriff of Fountain county to the lessor of the plaintiff, James A. Maxwell, who was the purchaser at the sale, duly acknowledged and dated the twenty-fifth of April, 1836.

The defendant thereupon offered in evidence an agreement in writing under seal, between Moore and James Maxwell, for himself and said John H. McCormick, by the name and description of James Maxwell & Co., dated the eighteenth of March, 1835, for the purpose of proving, among other things, an acknowledgment by Maxwell that the deed from Moore to Maxwell and McCormick had not been delivered to them by Moore, but was delivered at the time of its execution to one Bodley as an escrow; that a settlement of accounts had since taken place between Moore and Maxwell & Co.; and that the deed was, by agreement between the parties, to be destroyed and considered of no effect. To the introduction of that agreement as evidence the plaintiff objected, but the court overruled the objection, and permitted the agreement to be read to the jury, to which the plaintiff excepted.

It appeared in evidence that the James Maxwell who executed said agreement was another and different person from the lessor of the plaintiff, James A. Maxwell; that the firm of James Maxwell & Co. was composed of the said James Maxwell and John H. McCormick; and it further appeared that said McCormick was not present when Maxwell and Moore entered into the agreement, nor was there any proof that McCormick authorized Maxwell to make it. The jury on the foregoing testimony returned a verdict for the defendant, on which the court entered judgment. From that judgment the plaintiff has appealed to this court.

The instrument of writing, offered in evidence by the defendants to prove that the deed from Moore to Maxwell and McCormick had been delivered to Bodley as an escrow, was entered into on the eleventh of March, 1835, about one year after the rendition of the judgment against Maxwell and McCormick on which the land was sold. That judgment was a lien on the real estate of the defendants, and the effect of the declaration of Maxwell, and it may be the design of it, was to destroy that lien. This we think he could not do. The judgment debtor can not defeat the purchaser, nor affect the rights of the judgment creditor, or those claiming under him, by declaring he had no title to the land sold, or that the title to it was in a third person. The establishment of such a rule would be to invite and encourage fraud. In the case of *Phoenix v. Dey et al.*, 5 Johns. 412, the court says that the declarations of a party to a sale or transfer, going to destroy and take away the vested rights of another, can not, *ex post facto*, work that consequence,

nor be regarded as evidence against the vendee or assignee. So, it is decided that the declarations and confessions of parties, to the prejudice of the rights of third persons, are insufficient: 7 Cow. 760.¹ Admissions made by an insolvent debtor subsequently to insolvency, are not admissible against the trustees of his estate: *Smith v. Simmes*, 1 Esp. 330. When a plaintiff had, previously to the suit, assigned his interest in the debt, of which the defendant had notice, he could not impair that interest by any confessions subsequently made by him, to the prejudice of his assignee: *Frear v. Evertson*, 20 Johns. 142. So in *Taylor et al. v. Marshal*, 14 Id. 204, it is held, that after judgment and execution, an antecedent sale of the property levied on can not be set up and proved by the confessions and declarations of the parties, to the prejudice of the rights of a third person. The law seems to be well settled, that the admissions and declarations of a party, that tend to injure or impair the vested rights of third persons, will not be received to their prejudice.

By COURT. The judgment is reversed, and the verdict set aside with costs.

Cause remanded, etc.

DECLARATIONS OF A VENDOR.—Subsequent to the sale of property, when admissible: *Perry v. Smith*, 26 Am. Dec. 236 and note 238.

1. *Hurd v. West*.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

ARNOLD *v.* SHIELDS.

[5 DANA, 18.]

WRIT OF PROHIBITION IS AN EXISTING LEGAL REMEDY, in a proper case, in Kentucky.

CIRCUIT COURTS, IN THIS STATE, POSSESS GENERAL SUPERINTENDENCE over all subordinate courts, to keep them within their prescribed spheres, and to prevent usurpation.

WRIT OF PROHIBITION DOES NOT LIE to prevent a court from deciding erroneously, or from enforcing a wrong judgment, in a case in which it has a right to adjudicate, but only to prevent the usurpation of judicial power by a court that has no authority to decide the case which it is assuming to determine.

JUDGMENT CAN NEVER BE VOID WHERE THE COURT HAS JURISDICTION over the suit, and the right to determine whether the demand on which it was rendered was legal and enforceable or not.

JUDGMENT OF JUSTICE'S COURT FOR A PENALTY, in a sum within its jurisdiction, imposed by an unconstitutional statute, is not void, but merely erroneous, and may be corrected by an appeal to the circuit court; in such a case the magistrate has a right to adjudicate and to decide whether the statute under which such penalty is claimed is valid or void.

CIRCUIT COURT, IN SUCH A CASE, CAN NOT INTERPOSE by writ of prohibition, but can relieve the complaining party by appeal only.

PLEA TO THE JURISDICTION IS NECESSARY to the granting of a prohibition only in cases where a court may acquire jurisdiction by consent, waiver of objection, or by default, and not in cases where the court can not possibly acquire jurisdiction.

WRIT of prohibition from the circuit court of Jefferson county. The opinion states the case.

Pirtle and Guthrie, for the plaintiffs.

Owsley, for the defendants.

By Court, ROBERTSON, C. J. This appeal is prosecuted for reversing a final judgment of prohibition, rendered on demurrer to a declaration filed by the appellees, as lessees of a ferry over the Ohio river, from Albany, in Indiana, to Portland, in Kentucky, against the appellants—one of them as a justice of the peace, the other as the grantee of a ferry from the former place across the same river; and founded on an affidavit suggesting that one of the appellants, as a magistrate of Jefferson county, including Portland, had, at the instance of his co-appellant, issued sundry warrants against the appellees jointly, for enforcing, in each case, the penalty of fifty dollars, denounced by a statute of this state, in 1836, against the owners and lessees of ferries from the Indiana shore, for passing in their own boats, or for transporting in them, any person or thing, from any point on the opposite shore embraced in Jefferson county; and also, suggesting that judgment for the penalty of fifty dollars had been rendered in one of those cases, and that all the other cases were still pending; and therefore, praying for a writ of prohibition to prevent further proceedings on the judgment, as well as on the warrants.

The circuit court having rendered judgment on the declaration, for prohibition, according to the petition, the only questions presented for revision are those arising on the demurrer; and they may all be embraced in the following propositions:

1. Had the circuit court jurisdiction?
2. Was the declaration good?
 1. The first inquiry may be subdivided into four subordinate questions:
 1. Is an action in prohibition maintainable here in any case?
 2. Is a circuit court an appropriate forum for the maintenance of such a proceeding for prohibiting a justice of the peace from acting in a case *coram non judice*?
 3. If a circuit court may take cognizance of any such proceeding—has it power to order a prohibition in a case which, though not within the jurisdiction of the inferior court in which it may be pending, would not have been within its own cognizance, either original or revisory?
 4. Had the magistrate jurisdiction over the cases respecting which the prohibition in this case was ordered?
 1. Prohibition, being a useful and usual common law remedy, should be deemed applicable and proper here, unless abolished by statute or desuetude, or deemed inconsistent with our peculiar institutions. It has not been abolished by any posi-

tive enactments; nor can we perceive any reason for considering it either obsolete or incongruous. Wherefore, we do not feel authorized to decide otherwise than that it is still here an existing legal remedy in an appropriate case.

2. According to the common law, superior courts are entitled to a general superintendence over all subordinate courts, for the purpose of keeping them in their prescribed sphere, and of preventing usurpation: and therefore, in England, the king's bench and the common pleas have a general, and the chancellor a qualified, authority to restrain, by prohibition, all other courts inferior to them from exercising any arrogated jurisdiction. In this commonwealth, the circuit courts bear toward the county courts and justices of the peace a relation of superiority resembling, in all essential particulars, that of the king's bench over the inferior tribunals of England; and are the only courts of original jurisdiction in which a common law suit in prohibition could be maintained. If a proceeding for prohibition may be instituted in the court of appeals (a point we shall not now discuss), it could be done only in a case in which, in the exercise of its appellate jurisdiction, it has the power of controlling the inferior court by a direct revision of its judicial acts. Having no such power over justices of the peace, this court, if it can grant a prohibition in any case, could not have ordered that which was directed by the circuit court. And consequently it seems to us, that, in such a case as this, the circuit court of Jefferson had jurisdiction, if any court had.

3. Although it is sometimes said, that the object of a prohibition is to prevent the usurpation, by an inferior, of jurisdiction which belongs to a superior court, nevertheless, it seems, not only to accord with reason and fitness, but to be well settled by authority, that an inferior tribunal may be prohibited from acting in a case in which no court would be entitled to cognizance. The fact that a court is attempting to exercise control over a case in which it has no right to act, is a sufficient ground for prohibition, whether any other court would have jurisdiction or not. Thus in England, it has been decided, that a prohibition would lie to a suit there before the pope's collector *pro lesione fidei*, because, although no other tribunal had jurisdiction, still the pope's legate had no authority in England: Bro., Jurisdiction, 20; Com. Dig., tit. Prohibition, A 2, and F 1, 11. So likewise, if an inferior court attempt to act in a case in

which no court has authority: 4 Mod. 151;¹ Salk. 425.* And in the absence of authority, it would seem to be at least as proper to interfere by prohibition, in such a case of usurpation of power possessed by no court, as in a case of encroachment by an inferior on the jurisdiction delegated to a superior tribunal.

4. The authority of the circuit court to order the prohibition depends altogether on the assumed fact, that the justice of the peace had no jurisdiction over the cases in which he was attempting to proceed; for it is well settled that a writ of prohibition does not lie to prevent a court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate; but can be sustained only for preventing usurpation of judicial power by a court which has no authority to decide the case in which it assumes the right to act judicially.

The counsel for the defendants in error, conceding the correctness of the foregoing proposition, and admitting also (as we understood him), that, if the legislative enactment which the justice was attempting to enforce, and which declares that justices of the peace shall have jurisdiction to enforce the penalties denounced by it, be constitutional, his jurisdiction is unquestionable, and therefore the prohibition was extrajudicial—yet insists that the statute is unconstitutional, and that, therefore, as it could confer no authority, there was no jurisdiction in any court to render a judgment for the penalty prescribed for a violation of it.

Whether any provision in the act of 1836 should be deemed repugnant to that clause in the federal constitution which delegates to the congress of the United States "power to regulate commerce"—including, as has been decided, trade and navigation "between the states"—might be an interesting question; depending for its proper answer: 1. On whether, notwithstanding the comprehensiveness of that grant of power to the national legislature, a state may, nevertheless, exercise a concurrent authority not conflicting with any regulation by congress, as seems to have been at least intimated by the supreme court of the United States; or, if this be not so, 2. On whether the local power to regulate ferries, not being, according to judicial construction, surrendered by the states, would authorize a state to prohibit the transit of any person, or the transportation of any thing, across any of its rivers, otherwise than in a boat provided by the grantee of a ferry, under its authority.

1. *Carter v. Firsmin.*

2. *Arnot v. Brown.*

And a still more interesting and decisive inquiry might be, whether the statute of 1836 is inconsistent with that provision in the fundamental compact between Virginia and Kentucky, which guarantees to the states opposite to them, on the Ohio, a concurrent jurisdiction over that river.

Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial, and executive, as that possessed by Kentucky, over so much of the Ohio river as flows between them; and consequently, neither of them can, consistently with the compact, exercise any authority over their common river, so as to destroy, or impair, or obstruct the concurrent rights of the other. But as this court is not inclined to express even an intimation respecting the constitutionality of a legislative act, unless a judicial opinion on such a point be essential to the decision of the case before it, we are not now disposed to moot the questions just suggested, or to give an opinion respecting them; because, in our judgment, if the unconstitutionality of the act of 1836 be admitted, nevertheless, the magistrate below had jurisdiction to decide on the cases brought before him, involving the validity of the statute, and the consequential right to the sums of money claimed under it, by one of the appellants.

Each warrant being of the nature of an action of debt for a sum of money not exceeding fifty dollars, we can not perceive why, if any court could have exercised jurisdiction, a justice of the peace could not be entitled to cognizance under the statute of 1828, extending his jurisdiction to demands not exceeding fifty dollars, arising from contract, express or implied; for it is well settled, that the law implies a contract to pay every penalty which it prescribes, and that an action of debt may be maintained to recover it, unless some other exclusive remedy be provided.

When a warrant for a debt of fifty dollars was returned executed, the question to be decided, was, whether the defendants owed the plaintiff the amount claimed, or any sum within the jurisdiction of the officiating magistrate. If the act of 1836 be unconstitutional and therefore void, and if also, the magistrate would not, independently of that statute, have had jurisdiction to decide on a demand for fifty dollars claimed as a penalty due from the defendants to the plaintiff in the warrant, there could be no doubt that he would have had no jurisdiction; be-

cause his only authority would have been a void statute, which could confer no power. But if, without the enactment of 1836, he had jurisdiction over a suit for debt, on a claim not exceeding fifty dollars, the fact that there was no debt, because the statute under the sanction of which alone it could exist, was void, could not either oust or translate the jurisdiction to decide whether the debt, as claimed, was due or not. If the statute be unconstitutional, he ought to have so decided, and consequently he erred in rendering a judgment for the plaintiff in the warrant, and that error might have been corrected by an appeal to the circuit court.

But if he had no jurisdiction, his judgment was not merely erroneous—it was void, and a ministerial officer might have been guilty of trespass in attempting to enforce it by execution. Is the judgment void? We think not, even if the act of 1836 be a nullity. A judgment, however erroneous, is not void merely because it was ordered on a void claim. It can never be void when the court which rendered it had jurisdiction over the suit brought to obtain it, and a right to decide whether the demand be legal and enforceable or not.

If, instead of a penalty of fifty dollars, the statute had denounced one of five hundred dollars, and an action of debt had been brought in the circuit court of the county in which the warrant was issued, could it have been said that that court had no jurisdiction upon the hypothesis that the statute is unconstitutional, and therefore no penalty had been incurred?

In the case of Tobias Watkins, that question has been, in effect, decided in the negative. In that case, it was contended by the counsel of Watkins, that the indictment under which he had been convicted and imprisoned, did not charge any offense of which the court had cognizance, and that, therefore, the judgment was void, and his imprisonment consequently illegal. But the supreme court overruled his application for a *habeas corpus*, because, although, for the reason just suggested, the judgment was erroneous, nevertheless, as the court which rendered it had criminal jurisdiction in similar cases, its judgment was not void, and observed as follows: "To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its (the circuit court's) powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force,

unless reversed regularly by a proper superior court capable of reversing it. Had any offense against the laws of the United States been in fact committed, the circuit court for the District of Columbia could take cognizance of it. The question whether any offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide:" 3 Pet. 206. And in *Williams et al. v. Amroyd et al.*, 7 Cranch, 423, it was decided that the condemnation of goods captured under the Milan decree was not void for want of jurisdiction in the French court of prize in which it was pronounced, even though the supreme court of the United States was clearly of the opinion, that the decree of Milan was a palpable violation of the law of nations, and therefore, the goods were not prize, nor liable to condemnation as such.

The principle of those cases is applicable to this; and, when applied, leads to the conclusion that the magistrate having jurisdiction over the subject-matter (debt on implied contract), and the amount (fifty dollars), had a right to decide whether the penalty sued for was legally recoverable, or, in other words, whether the statute under which it was claimed, was valid or void; and that if the statute be unconstitutional, that fact does not show that the magistrate had no jurisdiction over the suit, but would prove only that his judgment was erroneous.

In England, a prohibition may go to a spiritual court, if it decide erroneously respecting the common or statute law. But the reason is only because such a court has no jurisdiction, except in matters controlled by the civil and canon laws.

In this case, the magistrate having a general jurisdiction over demands *ex contractu* amounting to not more than fifty dollars, the only question was, not whether he could adjudicate upon the warrant, but how he should decide—and consequently, he had a right to adjudicate, and therefore to decide, whether the statute, in virtue of which the sum of fifty dollars was claimed, was binding or void. Had he decided that the statute of 1836 is unconstitutional, and that, therefore, the plaintiff in the warrants was entitled to nothing, and should pay the costs—might not the judgment for costs have been legally enforced? Certainly and undeniably, as we think, if, as we have said, and confidently believe, the magistrate had jurisdiction over suits for debts not exceeding fifty dollars, founded on implied contracts. But jurisdiction so to decide in favor of one party necessarily implies the judicial authority to decide for the other

party. And the magistrate having such jurisdiction, the circuit court had no right to interpose by a writ of prohibition, and could relieve the complaining party by appeal only; for, as already suggested, if the magistrate had jurisdiction to decide whether the demands asserted in the warrants were legal or void, the circuit court had no power to prevent his judicial action in any of those cases by a writ of prohibition.

2. As the warrants were against the appellants jointly, and all for the like cause, we perceive no solid objection to a joint declaration by all, to prohibit proceeding in any and all of the cases, either before or after judgment; and there can be no doubt on the score of authority, that the magistrate was not improperly joined as a co-defendant.

Nor was it necessary, in such a case as this, to aver that a plea to the jurisdiction had been overruled; for if the magistrate had no jurisdiction, that fact appeared on the face of the proceedings; and in such a case, there being nothing extraneous to plead, a prohibition may be granted, either before or after judgment, without plea, because the defendant in the warrant could not, by consent or waiver, confer jurisdiction, if, in consequence of the alleged unconstitutionality of the statute of 1836, the magistrate had no cognizance over the case. It is only when a court may acquire jurisdiction by consent, or waiver of objection, or by default, that a plea to the jurisdiction is necessary to the granting of a prohibition: *Jac. Law Dict.*, and *Com. Dig.*, tit. Prohibition.

But the objection to the declaration chiefly relied on in the argument, was that it is not *qui tam*. Anciently, a common law court would not grant a prohibition unless there had been some contempt in proceeding after the service of an original writ of prohibition issued out of chancery, and then, upon an *alias* and *pluries*, directed to the party, an attachment might be issued returnable to the king's bench or common pleas; upon which a declaration might be filed for damages for the contempt. And, therefore, as for every contempt of the king's authority, the action, when any suit was brought, must have been *qui tam*, the practice of thus declaring first obtained. But the modern practice has been to dispense with the original writ of prohibition, and, in lieu of it, to file, in the first instance, in a common law court, a suggestion of facts, with a prayer for prohibition; and thereupon obtain a rule to show cause why a prohibition should not be issued; upon the return of which, either the court or the party cited may require a declaration.

And, in such a proceeding, it is evident that, prior to the filing of the declaration, there can have been no contempt in fact, for which damages could be recovered; and, therefore, in such a case, the suggestion of contempt, and the *qui tam* form of declaring, are mere fictions which are intraversable: *Croucher v. Collins*, 1 Saund. 136, n. 1, 2, 3. And consequently, a failure to aver that a writ of prohibition had been delivered, is no cause of demurrer: *Id.* n. 3, and *Bishop v. Eagle*, 11 Mod. 263.

It must be obvious, therefore, that when, as in this case, and in cases generally now, there has been no contempt, and the party declaring is not entitled to, and does not sue for, damages, the ancient fiction is not only unnecessary, but superfluous. And if so, the declaration need not be, and, in strict propriety, should not be, *qui tam*. Moreover, it is admitted to be only matter of form; and therefore, the omission of it here, now, can not be fatal on demurrer.

What has been already said is sufficient to show, that the judgment should not be deemed erroneous on the ground that it prohibits proceeding in more cases than one, and both before and after judgment. There is, therefore, in the opinion of this court, no other error in the record than the one resulting from the inappropriateness of proceeding by a writ of prohibition, to prevent that which the magistrate had judicial authority to do. If the plaintiffs have been unjustly harassed, other and different remedies are provided. Because there was no proper cause for a writ of prohibition, the judgment must be reversed.

Wherefore, it is considered by this court, that the judgment of the circuit court be reversed, and the cause remanded, with instructions to sustain the demurrer to the declaration, and give judgment of consultation, for the appellants.

PROHIBITION, WHEN IT LIES AND WHEN NOT: See note to *Mayor v. Morgan*, 18 Am. Dec. 236, 238; *Greir v. Taylor*, 17 Id. 731; *State v. Commissioners of Roads*, 12 Id. 596, note 604, where the subject is fully discussed.

JUDGMENT, WHEN VOID: See *Allen v. Huntington*, 16 Am. Dec. 702.

BOSLEY v. TAYLOR.

[5 DANA, 157.]

SURETY WHO PAYS WHOLE AMOUNT for which he and other sureties are bound to the same person for the performance of the same conditions, may compel contribution from such other sureties, although they are not bound by the same bond.

ALL THE SOLVENT SURETIES MUST BEAR THE BURDEN EQUALLY, where some of the sureties have become insolvent.

NON-RESIDENCY OF SURETY is equivalent to his actual insolvency, so far as the application of the doctrine of contribution is concerned.

SURETY WHOSE LIABILITY IS COLLATERAL MERELY, may justly submit to suit in order to ascertain the extent of his liability, and is entitled to contribution for the costs of such suit.

INTEREST IS ALLOWED TO SURETY WHO HAS PAID, from the time of the payment up to the final decree.

BILL in chancery, from the circuit court for Mercer county. The opinion states the case.

Cunningham, for the appellant.

No appearance for the appellees.

By Court, EWING, J. On the eighteenth of October, 1819, John Bosley, the appellant, and John Hanna, became the sureties of Harrison Munday, in an injunction bond executed by him to Durand and Schessanno, in the clerk's office of the Mercer circuit court, on a bill filed by him, enjoining a large judgment which they had recovered against him at law. Though the debt had been replevied pending the bill instituted by Munday, on the motion of Durand and Schessano, an order was made requiring him to give "new" or additional security, upon the alleged ground that Bosley and Hanna, his sureties, had become in doubtful circumstances. And thereupon, pursuant to the order, he, on the ninth day of April, 1823, executed a new or additional bond, with George W. Thompson, John Taylor, and William Munday as his sureties, for the same identical purposes and with precisely the same stipulations of the first injunction bond.

Munday's injunction having been dissolved, with damages and costs, Schessano, as surviving obligee, in September, 1831, brought an action of debt against the obligors in the first injunction bond, and having abated his suit as to Munday and Hanna, upon the return of the officer, recovered a judgment against Bosley, which he paid off to the attorney of Schessano on the fourteenth of October, 1833, amounting, then, with interest and costs, to the sum of three hundred and thirty dollars. Bosley thereupon exhibited his bill in chancery against the principal and sureties in both injunction bonds, alleging that Harrison Munday, the principal, and Hanna and William Munday, his co-sureties, had long since become insolvent and left the state, leaving Thompson and Taylor, the only remaining sureties, who were solvent, and prayed that they might be

decreed to pay him their equal shares of the sum which he had paid.

Thompson and Taylor answered, requiring proof of the insolvency of the principal and other sureties, but not denying that they were non-residents, and controverted their obligation to contribute, as being bound only in the second injunction bond. The complainant established the amount which he was bound to pay, and had paid in the injunction bond, and also proved the insolvency and non-residency of Hanna, and that the two Munday had long since removed from the state, but failed to prove their insolvency. The circuit court dismissed Bosley's bill, and he has appealed to this court.

The principles settled by this court, in the case of *Hutchcraft et al. v. Shrout's Heirs*, 1 Mon. 208 [15 Am. Dec. 100], and in the case of *Breckinridge v. Taylor*,¹ determined at the present term, are applicable to this case, and establish, upon the most unquestionable authority, the equitable right of the complainant to demand of the sureties, in the second bond, an equality of contribution; and the latter case settles that those of the sureties in each bond who are solvent, shall be made equally to bear the burden.

But it is now made a question, whether the non-residency alone of Harrison Munday, the principal, and William Munday, the surety, will entitle the complainant to ask that the burden shall be equally borne by himself and those sureties who remained in the state. We think it will. So far as the equitable rights and responsibilities of persons within this state are involved, this court has generally placed insolvency and non-residency on the same ground. In the case of equitable set-offs of distinct and disconnected demands, they are made to stand on the same ground. Either will entitle the complainant to a set-off. In the case of vendor and vendee, the non-residency as well as insolvency of the vendor will equally justify a bill to enjoin the consideration, till the title is made or tendered. And so in case of suit upon an assigned note against the assignor, the removal of the promisor from the state before the note fell due, will, in the general, excuse the assignee from the prosecution of a suit against him, as evidence of due diligence to entitle him to his suit against the assignor: *Clay v. Johnson*, 6 Mon. 651. Between parties contracting within this state, the non-residency of either, when a right accrues under the contract, is, as to the practical enforcement of their rights within the state, equivalent

to actual insolvency. So far as regards the state of Kentucky, or the process of her courts, the non-resident is actually insolvent in property and irresponsible in person.

The courts of equity of this state will not leave a party to the uncertain remedy of pursuing a party in a foreign state, beyond the reach of the powers of their tribunals, but will act upon the persons within their jurisdiction, and compel them to do equal justice to each other. A stronger moral obligation rests upon the defendants to pursue Munday for their several portions of an equal burden, than upon the complainant to pursue him for the whole amount. And as Bosley's liability was collateral merely, and the extent of it might not have been certainly ascertained without a suit on the injunction bond, we think he is entitled to contribution also, for the legal costs of the suit on that bond.

The decree of the circuit court is reversed, and the cause remanded, that interest may be calculated upon the sum paid by the complainant, on the judgment on the injunction bond, from the time of payment up to the final decree; and that the defendants, Thompson and Taylor, each be decreed to pay to the complainant one third thereof, and the costs of this suit; and it is directed that they pay the costs in this court.

CONTRIBUTION AMONG CO-SURETIES: See *Harrison v. Lane*, 27 Am. Dec. 607, and note 612, where the cases on this subject are collected.

GREEN v. HOLLINGSWORTH.

[5 DANA, 173.]

LAW WILL NOT AID EITHER OF THE PARTIES TO AN ILLEGAL CONTRACT, when both are equally in fault.

BAILEE OF SIMPLE DEPOSIT IS LIABLE, in case of loss of the thing bailed, for gross negligence only, unless, prior to the loss, he violated his implied obligation to return it in a reasonable time; and what is a reasonable time within which he ought, without demand, to return it, is a question of law for the court.

DEPOSIT MADE AT INSTANCE OF BAILEE requires the observance of ordinary care at least.

MORE THAN ORDINARY CARE IS REQUIRED BY LAW in case of a simple loan. DEGREE OF NEGLIGENCE, in such case, is a question of law for the court; but the facts to establish negligence must be found by the jury.

DELAY OF THREE WEEKS IN RETURNING WATCH indefinitely loaned for use, is not unreasonable.

BAILEE OF THING LOANED WITHOUT EXPRESS AGREEMENT, IS LIABLE FOR IT, if he fails, upon demand of restitution, to return it or claims it as his own, whatever may happen to it without the lender's agency or assent.

DETINUE, from the circuit court for Greenup county. The opinion states the case.

Morehead and Brown, for the appellant.

Hord, for the appellee.

By Court, ROBERTSON, C. J. Hollingsworth having obtained a verdict and judgment against Green, in an action of detinue, for a gold watch, several errors are assigned by Green, as arising from instructions and refusals to instruct the jury on the trial.

It appears from the bill of exceptions, that the parties being intimate acquaintances and cordial friends, and both being in a jocund mood on a public occasion, while Hollingsworth was a candidate for the legislature, Green said to him, in the hearing and presence of several persons, "Give me your watch and I will vote for you, and do all I can to assist you in your election;" whereupon Hollingsworth handed the watch to him, without the chain; and Green having fastened a twine string and a key to it, put it in his pocket, and they shortly afterwards separated, Green still retaining the watch; about three weeks after which, Green being on a hunting excursion, with the watch in his pocket, said, on his return home, that he had lost it in the woods; and having afterward engaged others to assist in searching for it, and not finding it, he offered a reward of ten dollars for its discovery and restoration; but the witnesses never heard that it had ever been since seen; that some time after the alleged loss of it, Hollingsworth requested Green to return it, which he, of course, failing to do, this suit was brought for a wrongful detention of it. The jury had to decide whether the foregoing facts conduced most strongly to establish a gift, a loan, a deposit, or a sale, on an illegal consideration; and if there was no sale nor gift, it was the province of the jury to decide whether the bailment was a loan or a mere deposit, and whether the watch had, as alleged, been lost; but it was the province of the court to decide respecting the degree of care required by law, according to the facts.

Hollingsworth could not recover, unless the jury had concluded that the watch had been bailed to Green; for it is evident that if it was sold upon an illegal consideration, although the contract was void, the law would not help either party, standing, as they would, in equal fault. It is to just such a case that the maxim *in pari delicto potior conditio defendentis*, is conclusively applicable. And whether, upon the hypothesis that

there was a bailment, there should have been a recovery, depends on the following considerations:

1. If the bailment was a simple deposit, with implied leave to carry the watch in the pocket, and if it was lost by the bailee, he is not liable unless he was guilty of gross negligence, or unless, prior to the loss, he had violated his implied obligation to return it in a reasonable time, and thereby rendered himself responsible for all consequences; and whether, without demand, it was his duty to have returned it within three weeks after the date of the deposit, was a question of law for the court, and not the jury, to decide. But the evidence will hardly allow the deduction that there was a mere deposit; and, if it would, it would perhaps also show that it was a deposit at the instance of Green, rather than of Hollingsworth, and therefore required the observance of ordinary care, at least.

2. If there was a simple loan, more than ordinary care was required by law. And if the watch was in fact lost, as alleged, it was the province of the court to decide as to what was gross, ordinary, and slight neglect, and that of the jury to determine whether the facts established the one, or the other, or any degree of negligence. If the watch was loaned to Green, when it was to be returned was a fact to be ascertained by the jury from the circumstances proved; and if those circumstances conduced to establish no special time, and, from the nature of the transaction as proved, the jury could have inferred that the parties actually intended a beneficial loan, the law made it the duty of Green to return the watch in a reasonable time. But, in such a state of case, of indefinite loan for use, a court could not decide that Green was guilty of a breach of his implied obligation, in not returning the watch within three weeks, or the time that elapsed before the alleged loss of it. Nor could it be decided, as a matter of law, upon the facts proved, that there was gross or even slight neglect in carrying the watch in his pocket when he was hunting. The use of it may have been, and probably was, especially important on such an occasion; and therefore, if there was culpable negligence in thus using it, the consequence might be that he could not have used it at all, without being responsible for an accidental loss of it in consequence of using it. But there may, *prima facie*, have been at least slight neglect in losing the watch out of his pocket.

If the watch was loaned without any express agreement, and if Green failed, upon a demand of restitution, to return it,

while he had it, or converted it, in judgment of law, by seriously claiming it as his own, he would be liable for it, whatever may have happened to it, without the agency or assent of Hollingsworth. But that is no proof of any such demand or conversion prior to the loss of the watch. And if the parties did not intend a bailment, there was no ground for serious controversy. There is scarcely a pretext for presuming a sale—it is much more probable that there was a gift.

As the instructions given by the circuit judge were, in some respects, essentially variant from the foregoing principles, and may have been, to some extent, prejudicial to the plaintiff in error, the judgment must be reversed, and the cause remanded for a new trial, without any intimation as to whether the verdict could have been sustained had there been no error in the instructions.

ILLEGAL CONTRACT, ACTION ON: See *Spurgeon v. McElwain*, 27 Am. Dec. 266, and note 267, where the other cases in this series are collected.

LIABILITY OF GRATUITOUS BAILEE: See *Beardslee v. Richardson*, 25 Am. Dec. 596, note 598, where the cases are collected.

JENNINGS v. FLANAGAN.

[5 DANA, 217.]

PAYMENT OF EARNEST MONEY does not necessarily transfer title to the specific property for which it has been given.

TROVER OR DETINUE CAN NOT BE MAINTAINED BY A PURCHASER against his vendor, until he has paid or tendered the entire consideration for the property bought.

COMPLETE AND PRESENT RIGHT OF PROPERTY DOES NOT VEST IN THE BUYER, while anything remains to be done on the part of the seller, before the commodity purchased is delivered.

TROVER from the circuit court for Breckinridge county. The opinion states the case.

Pirtle, for the plaintiffs.

No appearance for the defendant.

By Court, ROBERTSON, C. J. Murphy having borrowed some money from Jennings & Co., and agreed that they should have his unprised crop of tobacco, for six dollars a hundred weight, to be paid on the delivery of the tobacco, and having afterwards sold and delivered it to Flanagan—this action of trover and conversion was brought against the latter, for the value of the tobacco, as the property of Jennings & Co.;

and the court having instructed the jury to find for the defendant, verdict and a judgment were accordingly rendered in bar of the action; and the plaintiffs now complain that the instruction was erroneous, because, as they insist, the jury might have inferred that the sum advanced as a loan was intended as earnest money, and that the legal title to the tobacco had been vested, by the contract of sale, in themselves. We have no doubt that the facts might have justified the deduction that the sum advanced, or a portion of it, was entitled to all the effect of earnest money; but nevertheless, we have as little doubt that neither that, nor any other fact proved on the trial, could be deemed to have had the effect of transferring the property of the tobacco to the plaintiffs.

Earnest does not necessarily and always transfer the title to the specific property for which it has been given. It only binds the contract. Notwithstanding the payment of earnest, if the whole price is to be paid on delivery of the thing bought, of which there was no delivery at the time of the contract, the purchaser can not maintain detinue or trover for the property bought, until he shall have paid or tendered the entire consideration. And it is perfectly evident, in this case, that there had been no actual delivery of the tobacco to the plaintiffs, nor any payment or tender of the whole price agreed to be paid for it. The plaintiffs, however, insist that there was a constructive delivery, and that the vendor, after the contract, was their bailee. We admit that the contract may have been, and probably was, complete and binding on the parties; but we can not conceive that there was, according to any allowable interpretation of the evidence, a constructive delivery of the tobacco to the plaintiffs; or that the contract of sale was what should be deemed an executed agreement. Lord Ellenborough's test is, "that if anything remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is delivered, a complete present right of property has not attached in the buyer." And, in cases of doubt and difficulty, this has been generally considered, in England, a decisive criterion, and was so applied against the buyer, in the case of *Withers v. Lyss*, 4 Camp. 237, resembling this case in every material fact and characteristic. Here the quantity of the tobacco had not been ascertained, and it was necessary that the vendor should prepare it for delivery, and have it weighed, before there could have been a delivery or payment of the stipulated price; and, moreover, he had a lien on it for the consideration.

We are, therefore, clearly of the opinion that the property in the tobacco had not been transferred from the seller to the plaintiffs, so as to enable them to maintain trover for the conversion of it; for had the tobacco been consumed or spoiled, the day after the date of the contract, and without the vendor's fault, we can not doubt that the loss would have been his; and that, therefore, he could not have recovered the stipulated price.

Judgment affirmed.

PROPERTY DOES NOT PASS BY CONTRACT OF SALE, if anything remains to be done between the parties to put the articles sold in a deliverable state: *Pleasants v. Pendleton*, 18 Am. Dec. 726; *Davis v. Hall*, 14 Id. 373; *McDonald v. Hewett*, 8 Id. 241.

HALL v. BANK OF COMMONWEALTH.

[5 DANA, 288.]

SIGNING AND DELIVERING NOTE WITH BLANK TO BE AFTERWARDS FILLED BY AMOUNT, gives unlimited authority to insert any sum; and in an action on such a note, a plea that the blank was, without the authority of the maker, filled with a larger amount than was intended, is not sufficient.

PLEA THAT AMOUNT AND DATE ON MARGIN OF NOTE at time of its delivery, and intended to be inserted in the body thereof when filled up, were afterwards torn off without authority, and a different amount inserted, is good.

REPLICATION, TO PLEA OF NON EST FACTUM, that the note sued on was the act and deed of the maker, is insufficient.

PETITION and summons, from the circuit court for Franklin county. The opinion states the case.

Morehead and Brown, for the plaintiffs.

Crittenden, for the defendant.

By Court, ROBERTSON, C. J. To a suit by petition and summons against Nathan H. Hall, John Pope, and William Montgomery, on a note purporting to have been executed by them to the president and directors of the bank of the Commonwealth, on the second of September, 1829, for three thousand one hundred and twenty-five dollars, payable at the branch at Harrodsburg, in one hundred and twenty days, they pleaded four pleas; upon one of which only, that is the fourth, issue in fact was concluded. The plea averred only that the note had been signed and delivered in blank, with the intention and expectation that it would be filled up with a less sum than that which was afterwards inserted in it, without their authority, as

they allege; and, of course, as the law upon those facts implied an unlimited authority to insert any sum, the plea was insufficient. But the third plea averred, that when it was signed it was intended to be a note for only two thousand three hundred and thirty-six dollars; which sum was, therefore, inscribed in figures "on the top or margin;" and that being signed on the eighteenth of September, 1829, that date also was written on the paper when the parties signed it; and concluded as follows: "Which said sum and date did remain on the said paper when the same was so signed and delivered to the plaintiffs, with an intention and expectation that they should continue and constitute a part of the writing obligatory, and should be so filled and held by the plaintiffs. Yet the defendants say that the plaintiffs, without their assent, did tear off the said sum and the said date, and write and fill up the paper so as to make such writing as in the petition is mentioned, contrary to the intent and the authority given them as aforesaid—wherefore, the defendants say that the writing in the petition mentioned, is not their act and deed."

The replication to this third plea, without traversing the special facts averred in it, only alleged that the note, "as sued on, was made and executed to the said plaintiffs by the said defendants, and that the same is the genuine, true, and legal act and deed of them, the said defendants." A demurrer to that replication having been overruled by the court, the defendants declined pleading further; and thereupon, a verdict and judgment having been rendered on the issue of the fourth plea, this writ of error is prosecuted to reverse the judgment.

Had the third and fourth pleas been substantially identical, we should not doubt that the plaintiffs in error would have had no just cause for complaint: first, because the fourth plea is not good; and second, because if good, the virtual rejection of another, containing nothing more, could not have been prejudicial. But the third plea essentially differs from the fourth, and is, in our opinion, *prima facie*, a good bar to the action; for if, as averred in it, a sum and a date were written on the paper when it was signed and delivered, with the intention that it should be filled up with that sum and that date, and with no other sum or date, and if, without authority, that sum and date were torn off, and a larger sum and earlier date inserted, the note, "as sued on," is not, in judgment of law, obligatory as the act of the apparent obligors. For, those facts being admitted, and nothing else appearing, there was no implied au-

thority to insert any other sum, or any earlier date, than the sum and date which had been prescribed on the paper when signed and delivered to the bank; and the antedating was especially illegal. The only question, therefore, is whether the general replication was a sufficient response to the plea; and we are of the opinion that it was not.

The object of the special plea of *non est factum* in this case was to circumscribe the issue, and confine it to the facts pleaded, and as the facts averred in the plea are sufficient, if true, to show that the writing sued on is not the binding act of the party sued, the plaintiff can not recover without traversing the facts. A general replication that the writing is the act or deed of the party, is only a deduction of law, made by the plaintiff or his counsel, and is not a denial of the facts averred in the plea; and the facts, so averred and unanswered, should therefore be considered as having been admitted. The plea having admitted the signing and delivery of the note chiefly in blank, the plaintiffs, on an issue on the plea, would, in the first instance, be required to prove nothing, because all they could be bound to prove, on an issue on a general plea of *non est factum*, would be a fact admitted by this special plea; that is, the genuineness of the signatures of the defendants; and therefore, as an issue on the plea would throw the *onus* on the defendants, it was necessary to conclude the plea with a verification. If a defendant plead duress, a general replication averring only that the note or bond is the genuine act and deed of the defendant, would undoubtedly be insufficient upon demurrer. Precisely so, for the same reason, on this plea.

Wherefore, on deliberation, we are of the opinion that, as the replication did not traverse the material facts averred in the third plea, and as those facts, if true, should bar the action, the circuit court erred in overruling the demurrer to that replication; and that, as the demurrer was never waived, the error has not been cured by the verdict or otherwise.

It is, therefore, considered, that the judgment of the circuit court be reversed, and the cause remanded, with instructions to sustain the demurrer to the replication to the third plea.

BLANK NOTE FILLED UP BY PAYEE in a manner not contemplated or authorized by the maker, is not binding upon him unless he ratifies it: *Bank of Limestone v. Penick*, 15 Am. Dec. 136.

FILLING BLANKS IN WRITTEN INSTRUMENTS: See *Stahl v. Berger*, 13 Am. Dec. 666, note 669.

SMITH v. CREASON'S EXECUTORS.

[5 DANA, 298.]

ADMISSION THAT ABSENT WITNESSES, IF PRESENT, WOULD SWEAR TO THE FACTS expected to be proved by them, is not sufficient to defeat a motion for a continuance on the ground of the absence of witnesses; the admission must be of the facts themselves.

THE opinion states the case.

Turner, for the plaintiff.

Meniffee, for the defendants.

By Court, EWING, J. The only question which we deem necessary to determine in this case is, shall a party who has made out good grounds for a continuance, on account of the absence of witnesses, be ruled to trial upon the admission of his adversary, that his witnesses who are absent, if present, would swear to the facts which he states he expects to prove by them; or shall he be required to admit the fact proposed to be proven by them?

The common law rule of confronting the jurors with the witnesses in a public, oral examination, has ever been regarded by the wisest jurists as a most invaluable rule in the ascertainment of truth. By such an examination, a party has not only the benefit of the naked fact detailed, but also the benefit of the deportment, the manner, the physiognomy, the impression, detail, and intelligent reasons given by his witnesses, which are calculated to force conviction upon the triors, and greatly outweigh the same number of witnesses on the other side. Of all these he would be deprived, if compelled to go to trial upon the naked admission that his witnesses would swear to the facts which he proposes to prove by them. Such admission, if not forgotten, would make but little impression, amid a consistent and rational detail of a similar number of witnesses, deposing, orally, to facts of a counteracting character.

His right to bring his witnesses before the jury is a legal right, and which may be of essential advantage to him, especially in the establishment of controverted facts, and of which he ought not to be deprived. If, therefore, entitled to a continuance in such a case, he ought not to be deprived of it by any admission short of the admission of the fact intended to be proved by his absent witnesses. We perceive no error in the construction given by the circuit court to the writing sued on.

Judgment affirmed.

ELLIOT v. PORTER.

[5 DANA, 299.]

JUDGMENT IN DETINUE MERGES ALL RIGHT OF ACTION by the same plaintiff against the same defendant for the same cause of action; but such judgment does not extinguish any cause of action that such plaintiff may have against another person for the detention or conversion of, or trespass upon the same property.

MERE UNSATISFIED JUDGMENT AGAINST ONE OF SEVERAL, FOR DETENTION OF PROPERTY, is no bar to a suit against another guilty of the same or a different detention of the same thing.

COMPETENCY OF WITNESS IS NOT AFFECTED by mere solicitude for the success of one of the parties, arising from friendship, honorary obligation, or voluntary intention to divide the burden of a failure in the suit, or from a hope of participating in the advantages of success.

INTEREST, TO DISQUALIFY WITNESS, MUST BE A LEGAL INTEREST in the event of the suit.

TROVER, from the circuit court for Butler county. The opinion states the case.

Ewing, for the plaintiff.

Crittenden and Owsley, for the defendant.

By Court, **ROBERTSON, C. J.** Porter having obtained a verdict and judgment against Elliot, for six hundred dollars, for the conversion of one hundred and twenty-five barrels of salt, the latter now seeks a reversal on two grounds:

1. He insists that the circuit court erred, to his prejudice, in refusing to permit him to read a certified copy of the record of an action of detinue, in which Porter had previously obtained an alternative judgment against one Jacob Luce, for the same salt, or for its assessed value, of which judgment there had been no satisfaction. The judgment in detinue merged all right of action, by the same plaintiff, against the same defendant, for the same cause of action; because the judgment was of higher dignity than the previous right to sue for the salt or for its value. In such a case, and in such sense only, the maxim, *transit in rem judicatum*, applies. But the judgment did not extinguish any cause of action which the same plaintiff may have had for either a trespass upon, or a detention, or conversion of the same property by another person, either at a different time, or in conjunction with the party first sued.

A cause of action *ex contractu* against several persons may not be extinguished by a judgment against one of them; nothing short of a release or actual satisfaction will have that effect, when they were severally responsible. This is too well settled.

and understood to require support by argument or a citation of adjudged cases. The reason is even stronger in many cases *ex delicto*. It is true, that there is some diversity in the books respecting the legal effect of a judgment against one joint trespasser, on a subsequent suit by the same plaintiff against another joint trespasser, for the same wrong. Mr. Chitty has suggested that the judgment might bar the second suit, and refers to Cro. Jac. 74, and some other authorities, in support of his text. And the court of appeals of Virginia, without much apparent consideration, seems to have concurred in that view of the law, in the case of *Wilkes v. Jackson*, 2 Hen. & M. 355. But, if this be intended as applicable to all actions *ex delicto*, there is much opposing authority, strongly enforced by reason and analogy. Among the many adjudged cases to this effect, we will refer only to the following: *Livingston v. Bishop*, 1 Johns. 289 [3 Am. Dec. 330]; *Thomas v. Rumsey*, 6 Id. 30; *Campbell v. Phelps*, 1 Pick. 62 [11 Am. Dec. 139]; *Sheldon v. Kibbe*, 3 Conn. 214 [8 Am. Dec. 176]; *Hawkins v. Hatton*, 1 Nott & M. 318 [9 Am. Dec. 700]; *Ewing v. Ford*, 1 Marsh.¹ 457; *Morton's case*, Cro. Eliz. 30; *Corbet v. Barnes*, W. Jones. 377; *Bird v. Randall*, 3 Burr. 1345; *Hayden's case*, 11 Co. 5; *Sabin v. Long*, 1 Wils. 30; *Drake v. Mitchell et al.*, 3 East, 258.

And why should this not be the true doctrine? Is it doubted that, in trespass, a plaintiff may have several damages, and elect *de melioribus damnis*? And may he not, *pari ratione*, have several judgments in different actions, and make the same election? As the plaintiff may undoubtedly sue any one of several joint trespassers, why should a judgment against one (in an action of detainue, or assault and battery, for example) extinguish his cause of action against another, when it is not doubted that, in cases of contract, a judgment against one is no bar to a suit on the same contract against another jointly and severally bound?

Brown v. Woolton, reported in Yelverton, 67,² and in Cro. Jac. 73, seems to be referred to as the leading and first case in favor of the doctrine we are combating; and, in that case, the point, in support of which it has been referred to in some other cases, and by Mr. Chitty, was not necessarily determined, because, there had been not only a judgment, but also execution, against one of several who were jointly guilty; and besides, so far as the opinion, as rendered, should be deemed judicial, it is entitled to no influence, because the reason assigned for it was only that the demand rested in damages, and the judgment had re-

¹ 1 A. K. Marsh.

² Reported in Yelverton under name of *Brooms v. Woolton*.

duced them to certainty, and therefore another suit could not be maintained for that which was uncertain. That reason is not only inconclusive, but evidently suicidal; for, in many actions *ex contractu*, the plaintiff has a right only to unascertained damages; and yet, it is not doubted that a judgment against one for damages arising from a breach of contract, is no bar to a separate suit on the same contract, and for the same breach, against another party who was liable jointly and severally with the first defendant.

It is a general rule, that wherever there are several concurrent remedies for the same cause of action, in favor of the same person, against several different persons, judgment against one will not bar a suit against another. There must be satisfaction. Whether an unsatisfied judgment (for the value of the thing taken or converted), obtained by the owner in an action of trespass or trover, will *per se* bar a new suit against a different defendant for the same or a different asportation or conversion of the same property, is a question—so far as the value of the property is concerned—which would be affected by the proper answer to another; and that is, whether the mere judgment for damages, in such an action, would have the legal effect of transferring the title to the property for which the damages were adjudged. And this latter question is not, we confess, conclusively settled by authority.

A few old cases might be understood as assuming the true doctrine to be, that the title passes by operation of law, in consequence of the judgment for damages. Some more modern decisions, *contra*, require satisfaction of the judgment, and others the issuing of an execution upon it, as necessary for making the initiate election, to take the assessed value in lieu of the property itself, perfect and irrevocable. The maxim of the civil code was "*solutio pretii emptionis loco habetur*"—the payment of the price stands in the place of a purchase, or has the effect of a purchase. And in *Drake v. Mitchell*, 3 East, 258, Lord Ellenborough said that, though a judgment will merge the particular cause of action for which it was obtained, it is only a security, and will not bar any collateral remedy, or operate as a legal transfer of title until there shall have been actual satisfaction. And this seems to have been the opinion of one of the most illustrious of American jurists, Chancellor Kent. But as the decision of this point is not necessary in this case, we will not discuss it, or express a definitive opinion respecting it; for whatever may be the legal effect of a judgment in trover, a

judgment in detinue, standing on ground altogether different, can not bar a new suit either in detinue or trover for the same cause of action, against a different defendant, on any such ground as a legal transference of the title by the judgment which entitles the plaintiff to restitution of the property.

We can perceive no reason, and know of no authority, for deciding that, where several persons have been guilty, either jointly or severally, of detaining the same thing from the same owner, a judgment in detinue against one of them, without satisfaction, should bar a suit against another of them, either for the detention or the conversion of the same thing. If, as we presume should not now be controverted, a judgment against one of the several persons who were severally and jointly liable by contract, or for assault and battery, would not extinguish the same plaintiff's legal cause of action against one of the others whom he might in the first instance have sued, there can be no consistent reason for making a judgment in detinue a bar to another action of detinue or trover against another defendant for the same cause of action; or rather, for the detention or the conversion of the same property from the same owner. Why, in such a case, should a mere judgment against one, exonerate another? He can not plead that the plaintiff has been satisfied; nor that his cause of action, once perfect against himself, had been extinguished by a judgment, without satisfaction, against another person. Nor could he, like the defendant in the judgment, object that the second suit was vexatious, as it was the first and only one against himself.

When a cause of action is joint only, a judgment against one may bar an action against another who was jointly liable with him; but the only efficient reason that could be assigned for such a doctrine, is that the one sued last might, if sued alone, plead the non-joinder of the other, and the latter, if associated with him in the action, might plead the separate judgment rendered against him for the same cause of action, even though it was irregular, and might have been prevented by pleading the non-joinder. But a liability for a tort being several as well as joint, a mere unsatisfied judgment against one of several, for detention of property, should not operate as a bar to a suit against another guilty of the same or a different detention of the same thing. The whole original cause of action, even when joint, is never extinguished, in such a case, until there has been satisfaction or release. But there can be but one satisfaction for the same wrong. When several judgments

have been obtained on the same cause of action, the plaintiff must elect which he will enforce; and when he shall have once elected, perhaps he may be enjoined from proceeding on another. Certainly one satisfaction would be sufficient to enjoin him. In such a case, the *audita querela* was the appropriate and usual common law remedy. And a motion, and perhaps a bill in chancery, might effect the same purpose now, and in this country, as well in cases *ex delicto*, as in those *ex contractu*.

According to the foregoing conclusion, the unsatisfied judgment against Luce, is no legal bar to this suit; and the more especially, as it neither appears, nor was even suggested, that the conversion here complained of and the detention for which the judgment was rendered, were the same act of Luce and the present party; for if, as may be the case, the detention by the one, and the conversion by the other, were several and independent wrongs, there can not be even as much reason for making the judgment for one injury a bar to a suit for the other, as there might be for barring an action *ex contractu* against one person, by a judgment against another severally liable on the same contract.

2. The plaintiff in error insists that the circuit court erred, in deciding that a witness who gave testimony against him, was not incompetent, on the ground of interest disclosed by himself.

It does not appear that the witness had any legal interest in the event of the suit. On his *voir dire*, he stated that he felt some interest in behalf of the plaintiff, because he had sold to him (the plaintiff) the salt for which this suit is prosecuted, and intended not to exact the whole price if the plaintiff should fail to obtain a judgment, though he had made no agreement to that effect, and was under no obligation to remit any portion of the stipulated price. These facts—and there are no others—show that the witness was not incompetent in consequence of any legal interest. But, if he felt that he had a legal interest in the event of the suit, he was not competent, even though he was mistaken in his opinion as to what was a legal and disqualifying interest. When there is a legal and certain interest, however minute, in the event of a pending suit, the law, upon grounds of policy, presumes that it will incline the witness, thus interested, to swear as he would in his own case. And certainly if he feel, though erroneously, that he has such an interest, the reason of the interdiction applies with full force. But mere solicitude for the success of one of the parties, arising only from friendship, or from an honorary obligation, or voluntary

intention to divide with him the burden of a failure in his suit, or from an expectation of participating in the advantage of his success, will not affect the competency of a witness. If, then, the witness in this case felt that his interest was legal, or, in other words, that he was under a legal obligation to remit anything to the plaintiff in the event of his failing in this suit, he was incompetent: otherwise his feelings should have affected his credibility only.

Now, although he said that he felt some interest, nevertheless the grounds of that feeling, as explained by himself, show that his interest was not of the disqualifying kind; and therefore, nothing appearing to the contrary, we should presume that he did not feel or intend to be understood as suggesting that he had any legal interest in the event of the suit. And consequently, as in a doubtful case, an objection to a witness should be applied to his credit, rather than his competency, it is the opinion of this court, that the circuit judge did not err in admitting, as competent, the testimony which was objected to as incompetent, on the ground of supposed legal interest.

It seems to us, therefore, that neither of the objections which have been urged against the judgment can be sustained.

Wherefore, it is considered that the judgment of the circuit court be affirmed.

WITNESS, WHAT INTEREST DOES NOT RENDER PERSON INCOMPETENT TO RE:
See *Woodard v. Spiller*, 25 Am. Dec. 139; *Rowley v. Bigelow*, 23 Id. 607;
Union Bank v. Knapp, 15 Id. 181.

MATTOX v. BAYS.

[5 DANA, 461.]

REFUSAL TO DENY A FACT BY AN EXTRAJUDICIAL OATH is not legal evidence of the fact against the party refusing the oath, and it is error to admit testimony of either the taking or refusing of such oath.

TRESPASS, from the circuit court for Morgan county. The opinion states the case.

Apperson, for the plaintiff.

No appearance for the defendant.

By Court, MARSHALL, J. This was an action of trespass *vi et armis*, brought by Bays against Mattox, for the alleged burning and destroying of various articles of personal property belonging to the plaintiff. The defendant pleaded not guilty; and on

the trial, the court, notwithstanding the objection of the defendant, permitted the plaintiff to ask a witness, "if a large company, who were present shortly after the destruction of the plaintiff's property, did not all agree to be sworn to their innocence, except the defendant, who refused, and if all were not sworn by John Sykins, a justice of the peace, except the defendant." The answer was permitted to go to the jury, as a circumstance to which they might give such weight as they chose. A verdict and judgment were rendered for the plaintiff, and the only point presented for our consideration, is whether the court erred in permitting the foregoing question to be put and answered.

The multiplication of unauthorized oaths is manifestly inconsistent with public policy, as it tends to diminish the efficacy of those sanctions, the strength of which forms the surest protection to the interests of society; and we are of opinion that the admission of the testimony offered was a violation of this policy. It may be admitted that the refusal of the defendant to take the oath proposed in this case, if not founded upon any objection to the rightfulness of administering and taking such extrajudicial oaths, might furnish ground for inferences unfavorable to him, as the fact of taking it, might also furnish ground for favorable inferences as to those by whom it was taken.

It might be presumed that, in the one case, the party would not voluntarily have made such an appeal, unless he were conscious of his innocence, and that, in the other, he would not have refused to make it, unless he had been conscious of guilt. But whatever effect the application of such a test may have on the minds of those who are not concerned in the administration of the laws, it is entitled to none in a court of justice, where the administering of an oath in legal form is regarded, not only as the highest test of truth, but as an instrument appropriated by the law for its ascertainment in judicial investigations. The sanctity of which instrument, as the law guards it by the denunciation of heavy penalties, should also be guarded by the ministers of the law, by withholding and discountenancing its application, except in cases authorized by law, or justified by an obvious necessity. But to establish the doctrine, that the refusal to deny a fact by an extrajudicial oath, is legal evidence of the fact against the party refusing the oath, is, in effect, to sanction the administration of the oath, and compels the party to take it, under penalty of having the fact found against him, if he refuse. If a party be innocent, he must take the oath, if it be

proposed, or he may be found guilty without evidence. If he be guilty, he must take a false oath, if any one propose it, or his refusal will furnish, perhaps, the only evidence of his guilt. The guilty may be willing to take an oath, for the falsity of which they will be subject to no legal punishment, while the innocent may be unwilling to take it, because it is unauthorized, and may be regarded, on that account, as a profane appeal to the author of truth. There is neither justice, nor propriety, in such a course of procedure, nor does it derive any aid from considerations of public necessity or convenience.

For this court then to recognize as legitimate such a mode of procuring evidence, would be to give its sanction to the administering of oaths without authority or necessity, and against the policy of the law, and would be encouraging a resort to this unauthorized test, with the probable effect of doing injustice, in many cases, and with the certain consequence of increasing the number of actual perjuries, of depreciating the sanctity of judicial oaths, and of diminishing that regard to truth which is the best security for individual rights, and social harmony. We can not, therefore, concur with the circuit court in relation to the admissibility of this testimony.

And because it was erroneously admitted, the judgment is reversed, and the cause remanded, that a new trial may be had, on principles conformable to this opinion.

KENDALL v. RUSSELL.

[5 DANA, 501.]

INTENTION OF PARTIES TO A CONTRACT GOVERNS in its construction.

CUSTOM OR USAGE OF TRADE MAY BE USED as a means of ascertaining the intention of parties to a contract, but never to thwart or control such intention.

CONTRACT FOR AS MANY BRICK AS THE BUYER NEEDS to complete his building, at a fixed rate per thousand, can not be varied by evidence of a custom of the country for the buyer to pay for brick enough to build all the walls solid, without making allowance for the openings for doors and windows.

CUSTOM OR USAGE OF TRADE, TO BE OBLIGATORY, MUST BE CERTAIN, uniform, reasonable, and sufficiently ancient to be generally known.

COVENANT, from the circuit court for Todd county. The opinion states the case.

Morehead and Brown, for the appellant.

J. T. Morehead, for the appellee.

By Court, EWING, J. An action of covenant was brought by Russell against Kendall, on an article of agreement, by which Russell bound himself to lay, for Kendall, on his new brick building, "as many brick as he may need, to complete said building;" for which, Kendall bound himself to pay eight dollars per thousand for each thousand brick which may be laid.

Three witnesses were introduced by the plaintiff, who stated that they were bricklayers, and that it was the custom of the country to count all the openings in the buildings—doors, windows, chimneys, etc., as solid work, and to be paid for accordingly. A witness introduced by the defendant, proved that there had been considerable difficulty at Russellville, a neighboring town, as to measuring brick work, between the people and the bricklayers; and of late years, they had settled down upon a compromise of the difficulty, upon the following terms, to wit: that the openings should be included in paying for the labor of laying, and excluded in estimating the price of the material used. A verdict having been found for the plaintiff, including the openings, in estimating the price for the materials, as well as for laying, and a motion for a new trial overruled, Kendall has brought the case to this court.

The question involved is, whether the facts made out in proof should be permitted to control the stipulations of the covenant sued on, so as to sustain the verdict.

The intention of the parties to a contract, is the leading rule in their construction. To this paramount rule all others are subordinate. The parties should be bound for what they intended to be bound, and no more. The courts will hold them bound to that extent, and no further, if that can be arrived at. To hold any one bound further, would be to impose an obligation upon him, which he never assented to, or intended to take upon himself, and would be the height of injustice and oppression. A custom or usage of trade is only allowable, as one mean to arrive at the intention, never to thwart or control it. If the stipulations of a contract indicate an intention in the obligor variant from the usage, then should the stipulations prevail; otherwise an obligation may be imposed contrary to the intention, though provided against by the express terms of the contract.

Testing this case by these rules, two questions arise: 1. Does the obligation of Kendall indicate an intention to fix a rule for his liability variant from the usage? 2. If it did not,

was the proof of a custom such as to entitle it to the force of a general usage.

1. We think the stipulations of the contract are clear and explicit, and indicate clearly his intention as to the extent of his liability.

He first stipulates for as many brick as he may need to complete his building; and then binds himself to pay eight dollars a thousand for each thousand brick that may be laid. With these stipulations in his contract, can it be imagined that he intended to pay for a third, fourth, or half as many more brick as he needed, or for several thousand brick more than should be laid in his building? If he did not intend to do so, then the stipulations of his contract should not be so construed as to impose the obligation upon him. These stipulations not only show an absence of intention to be bound to that extent, but also by any fair interpretation, to exclude the idea of an intention to be thus bound.

The number of brick which he needed, he contracted for, and no more, and as many as he should get, he agreed to pay for. It is difficult to conceive how he could be made to pay for more than he needed or got, consistent with his intention as expressed by the clear terms of his contract. Had he contracted to pay the customary price, or at the rate of eight dollars per thousand, without saying more, then perhaps the usage may have been resorted to, as the mean of ascertaining the intention of the parties, as to the terms of the contract. But the special stipulations seem to indicate to us, a clear intention on the part of the obligor, to be bound only to pay for the numerical number of brick that might be needed, and be actually placed in the walls, and no more. But if there were doubts on this point, it is certainly questionable whether the usage attempted to be made out in proof, should prevail.

The witnesses speak of its being a custom of the country: nothing is said of the extent of its prevalence, or of the length of time that it has existed. Now to make a custom or usage of trade obligatory, it must be certain, uniform, reasonable, and sufficiently ancient to be generally known. It must be certain and uniform to entitle it to respect, against the known rules of law for the construction of contracts. It must be reasonable, to entitle it to any consideration; and sufficiently ancient to be generally known, or it might thwart, rather than carry into effect, the intention of the parties, or impose an obligation upon one which he never intended to take upon himself: 8 American

Com. L. Abridgment, 230. If not so ancient, as by intendment of law to be generally known, if it could avail at all, it certainly should not do so, without it was brought home to the contracting obligor, by actual notice. Otherwise, it might be made an instrument in the hands of the craftsmen of the trade, to delude the unwary.

We can not understand that the custom or usage was of sufficiently long standing, or general prevalence, as to imply that Kendall had knowledge of it; nor was there any proof of express notice. And the fact that the citizens of a neighboring town resisted the claim on the part of the mechanics, and they had been compelled to abandon it, evidences that it was not universal, even in the same vicinity, nor regarded by a portion of the community as very reasonable.

The judgment of the circuit court is reversed, and cause remanded, that a new trial may be granted.

Cited in *Signeworth v. McIntyre*, 18 Ill. 128, to the point that parol evidence is receivable in proof of usage in trades and branches of industry, where the language of the contract is not clearly expressed.

EVIDENCE OF USAGE, WHERE THERE IS A WRITTEN CONTRACT, admissibility of: See note to *Boorman v. Jenkins*, 27 Am. Dec. 166, and the cases cited; *Allegre v. Md. Ins. Co.*, 14 Id. 289; where there is a parol contract: *Thompson v. Hamilton*, 23 Id. 619.

USAGE TO BE GOOD MUST BE REASONABLE: *Barksdale v. Brown*, 9 Id. 720.

INTENTION OF PARTIES GOVERNS IN CONSTRUCTION OF CONTRACT: *Singleton v. Carroll*, 22 Am. Dec. 95; *Roberts v. Beatty*, 21 Id. 410.

MAUPIN'S EXECUTOR v. DULANY'S DEVISEES.

[5 DANA, 589.]

COURT OF EQUITY WILL SANCTION SUCH USE OF WARD'S FUNDS by his testamentary guardian, as it would have authorized him to make, had a special application been previously made.

COURT WILL DIRECT PROFITS OF TESTATOR'S ESTATE to be applied to the support of his children, although the will provide that they should be lent out until the youngest child attains his majority, and then divided among them.

TESTAMENTARY GUARDIAN SHOULD NOT BE CHARGED WITH COMPOUND ANNUAL INTEREST on rents of land received by him; he is not, like statutory guardians, required to settle annually with the county court, but is a trustee, and not chargeable with more interest than he actually received, or than a faithful and prudent fiduciary ought to have received.

GUARDIAN SHOULD BE ALLOWED FOR CLOTHING HIS WARDS, although he made no regular charge for it; and also for their board, where, although

old enough to earn their own board, it is shown that they were, for a great portion of the time, at school.

EXECUTOR OF TESTAMENTARY GUARDIAN can not be allowed anything for personal services rendered by such guardian to his wards, where the guardian made no charge for such services; actual expenses, and compensation for their board and clothing only, can be allowed.

SETTLEMENTS MADE BY TESTAMENTARY GUARDIAN WITH COUNTY COURT are *prima facie* evidence in a suit in equity, where the guardian was requested, by the will, to make such settlements.

BILL in chancery, from the circuit court for Madison county. The opinion states the case.

Owsley, for the plaintiff.

Turner, for the defendants.

By Court, **ROBERTSON, C. J.** The decree which this writ of error seeks to reverse, was rendered in favor of the children of William Dulany, deceased, against the personal representatives of Daniel Maupin, deceased, their testamentary guardian, appointed by their father's will, published and admitted to record early in 1815, and containing the following among other provisions not material to the questions litigated in this suit:

"I do allow all my property—land and negroes excepted—to be sold, and the money arising therefrom to pay all my just debts and funeral expenses, and the balance, if any, to go to the education and support of my four infant children—my farm, on which I now live, together with my mill-place, I allow to be rented out to the best advantage, and any moneys arising from the same to be equally divided among my children. I allow all my slaves to be hired out in Madison, and their hire, and any surplus money from sales and hire, after schooling and clothing the children, is to be put to interest until the youngest child becomes of age, when there is to be an equal division of land, slaves, and any money that may remain. * * * I also request that this my last will and testament be faithfully executed—and, also, that Captain Daniel Maupin, of Madison county, is hereby appointed by me as guardian for my four children, viz.: James, Betsy, Jane, and William Dulany. The said Maupin is to receive and receipt for any money that the executors may have in their hands, and to show to the court that he has applied it well."

Maupin accepted the trust delegated by the will, and seems to have executed it in all respects faithfully, until his death, which, as we infer, occurred since 1833, when the youngest of

the four children of the testator had attained twenty-one years of age, and all of whom he supported in his own family, and educated, until they either married or became twenty-one years old.

In 1816, at different times, he received from the executors, in trust for his wards, the aggregated sum of two hundred and forty-seven dollars and seventy-eight cents; and in 1817, at different times, the aggregate sum of one hundred and ninety-two dollars and seventy-two cents—making, altogether, the sum of four hundred and forty dollars and fifty cents. In addition to which he may be presumed to have received for rents an average sum of something like seventy-five dollars annually, during his life, and during a portion of the same time, about thirty-five dollars annually, for negro hire. After his death, this suit in chancery was instituted by William G. Dulany, and his sister Jane and her husband, David Thomas, and the administrator and infant child of the other sister, Betsy (who had died), praying for an account—the fourth ward, James Dulany, having settled his own account and died. The circuit court having decreed, severally, to William G. Dulany, five hundred and twenty-nine dollars and nineteen cents; to Thomas and wife, five hundred and seventy-four dollars and forty-eight cents; and to the infant complainant, six hundred and fifteen dollars and fifty cents. Maupin's representatives now complain of that decree, and we think justly, for the following general reasons:

1. Although the amount allowed to Maupin for his general services, and for boarding and educating Betsy, Jane, and William J. Dulany—estimated by rules and presumptions far from liberal, and, in some respects, unreasonable—exceeded the whole amount of money ever received by him, from the executors, for their benefit; and the aggregate amount, also, of negro hire, computed rigidly, and, in some respects, erroneously, against him—that excess, amounting to about two hundred and thirty dollars, was not allowed to his representatives, because, in the opinion of the circuit judge, he had no right to appropriate, to the maintenance and education of his wards, any portion of the rents of the land, or of the interest thereon.

In that view of the case, we can not concur. The provisions quoted from the will are certainly, in some degree, awkwardly and unskillfully written; they dedicate, 1. The surplus, if any, of the proceeds of sales of the personal estate to the education and support of the testator's four children, all infants; and, 2. the proceeds of hire of the slaves to the education and clothing

of the children; and the rents of lands are bequeathed to the children, to be equally divided among them, when the youngest shall attain twenty-one years of age; at which time, also, there was, by the direction of the will, to be an equal division of land, slaves, and "any money that [should] remain." Thus, according to the literal import of each distinct sentence of the will, taken separately, the rents constituted a capital fund for distribution among the children, when the youngest of them should become twenty-one years old; any surplus of the personal estate, if, after paying debts, there should be any such surplus, was a fund for their education and support; and the hire of slaves was a fund for their education and clothing. Such a literal and exclusive interpretation of each of those provisions, separately, is unreasonable and incongruous. Moreover, though, in one of them, the proceeds of sales, after paying debts, were dedicated to education and support, yet, in another, the letter of the will appropriated the avails of both the hire and sales to education and clothing.

But to ascertain the true objects of the testator, all those provisions for his children should be considered together, and construed liberally and consistently. And, thus considered and interpreted, they authorize the deduction that the testator intended that any little surplus of his chattels which might remain after the payment of his debts, and also the profits which might accrue from his land and slaves, which would, as he knew, be inconsiderable, should constitute an aggregate fund for the education and maintenance of his four infant children, to whom he devised his land and two only slaves, a woman and a boy; and whatever of the intermediate profits which should remain after educating and supporting them, to be equally divided when the youngest child should attain majority. There was no motive for excepting the rents of land, that would not equally apply to the hire of slaves; and it is evident, not only that the testator intended that his children should be educated and maintained by the profits of the estate devised to them; but that he did not know how much, or whether any, of the proceeds of the sale of his chattels would be left, after paying his debts; and, therefore, he declared that, if any money arising from his estate should, at the appointed time of division, remain, after paying for education and support, it should be equally divided among his children. Moreover, had there been, as the testator seemed to apprehend, no surplus of his personal estate, after the payment of his debts,

the aggregate of both hire and rents would have been, obviously, but a scanty provision for the maintenance of his children. And though there happened to be four hundred and forty dollars and fifty cents of the proceeds of the personalty, after the payment of debts, even that fund, united with that arising from hire of slaves, was inadequate to the purpose of proper education and maintenance.

It seems to us, therefore, that, according to a proper construction of the will, Maupin had a right to apply rents, as well as hire and as money received from the executors, to the purpose of properly fulfilling the trust imposed on him by the testator. Besides, as he was not a statutory guardian, but a mere trustee appointed by the father, equity should now sanction such appropriations by him, as it would have authorized him to make had a special application to a court of equity, for that purpose, been necessary, and been therefore made by him. And we have no doubt that, even if the will should be construed as not giving express power to him to apply the profits of the land to the education and support of the infant devisees, a court of equity would not have hesitated to direct such an application of those profits as the general purpose of the testator, as to the maintenance of his children, rendered proper, and their interests required.

2. It was unreasonable, and therefore inequitable, to charge Maupin with compound annual interest on the rents of the land: first, because the only reason for ever making such a charge against a delinquent statutory guardian—that is, because the statute requires an annual settlement with the proper county court, by all such guardians, and directs that the balance in their hands of principal and interest upon each settlement, shall constitute a principal fund—does not apply to a testamentary guardian, who is not required to make any such settlement; over whom the county courts have no jurisdiction, and who, like other trustees, are subject to the control of a court of equity, according to the general principles of equity, regulating trusts; and, secondly, because, as a trustee, Maupin was not, upon general principles of equity, chargeable with more interest than he actually received, or, as a faithful and prudent fiduciary, he ought, and therefore should be, presumed to have received. And it could not be presumed that he made annual compound interest on the rents, or on any other funds in his hands. But, doubtless, he occasionally made some interest, and loaned it or used it; and, therefore, he ought to be

charged with some interest upon interest; and about three years would, we suppose, be reasonable rests, whenever the annual interest was not absorbed by annual disbursements; that is, any interest, for any three years, that might remain after deducting the disbursements for the same three years, should, at the end of that period, be added to the principal fund.

Rests should be regulated by the circumstances peculiar to each case. And three years would, we think, be a reasonable period for making intermediate interest principal, in this case; because, although the relief system prevailed during a portion of the time for which the account is to be taken, yet the will made it the duty of Maupin to make all moneys in his hands productive, by loans, and we presume that, according to an average estimate, he might, and therefore should, have loaned accruing interest at the end of every three years.

3. Scarcely any allowance seems to have been made for clothing, because, as we presume, there was no regular charge therefor. This was, we think, unreasonable; for there is no suggestion that the children were not well clad. And there was error, also, in withholding any allowance for board for some years, when—though the children were old enough to render useful service, equivalent, perhaps, to the value of their board—it is almost certain that they were, for a great portion of the time, at school. And it was hard, also, to charge for hire of the negro woman, for some years, when she was in such a condition that the children, who were then keeping house, kept her alternately among themselves, as a distributive burden, rather than a benefit.

But we are of the opinion, also, that—being both trustee and grandfather of his testamentary wards, and not having made any stipulation, or even charge, for mere personal service and care—the circuit court erred to the prejudice of the defendants in error, also, in allowing to Maupin compensation for such service and care. His actual disbursements, so far as proved, or as should be presumed, should alone be reimbursed. But this curtailment, which may appear, and possibly may be, somewhat harsh, fortifies the claim to a full reimbursement of his actual expenses, and a reasonable compensation for board and clothes, to be ascertained by the ordinary standard, combined with the fact, that the persons whom he kept in his family, and fed and clad, were confided to his protection, chiefly, if not solely, because they were his fatherless and

motherless grandchildren. According to this blended criterion, the sums allowed for board, when a full allowance was made, would seem to be liberal enough.

As the testator requested that Maupin should account before the county court, the few settlements made by that court, should be deemed *prima facie* evidence as far as they go.

Wherefore, it is decreed and ordered, that the decree of the circuit court be reversed, and the cause remanded, for further proceedings and decree.

GUARDIAN IS ENTITLED TO REIMBURSEMENT for boarding and clothing his wards: *McDowell v. Caldwell*, 16 Am. Dec. 635.

AM. DEC. VOL. XXX—45

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

TICKNER v. ROBERTS.

[11 LOUISIANA, 14.]

THE FORM OF PUBLIC INSTRUMENTS is regulated by the laws of the country in which they are made.

DEMAND UPON THE DRAWEE WILL NOT BE PRESUMED in the absence of evidence thereof.

DRAWER'S PROMISE TO PAY A DRAFT made in ignorance that no demand has been made, is not binding.

ONUS OF PROVING DEMAND lies upon the payee; the drawer is not obliged to prove no demand.

ACTION against the drawer of a bill, who had promised to pay the same, thinking that it had been regularly presented and protested for non-payment. The case further appears from the opinion. Judgment for the plaintiff. Appeal.

Thomas Slidell, for the plaintiffs.

Elmore, King, and Gray, contra.

By Court, **MARTIN, J.** The defendant is appellant from a judgment against him, as drawer of a bill. His counsel contends that he is not liable, because there was no demand upon the drawee, and that the plaintiffs can not avail themselves of his promise to pay the draft, because this promise was made while he was ignorant that no demand was made. The evidence of the demand is presented in an instrument purporting to be a protest.

The greatest portion of the state of Alabama was theretofore a part of the Mississippi territory; by the laws of which, notarial instruments were required to be authenticated by a seal, containing the coat of arms of the territory, the name and

surname of the notary, his official capacity, and the place in which he exercised his office. After the erection of Alabama into an independent state, the legislature adopted the coat of arms of the former territory, as that of the new state. In a later digest of the laws of Alabama, the law of the Mississippi territory, just cited, is inserted; and by a late act of assembly, is declared to be still in force. The protest under consideration is not authenticated with a seal like the one above described. The one used by the notary has neither his name nor surname, but only the initials of them; neither has it the coat of arms. Witnesses have testified that a seal like the one the impression of which appears on the protest, is used by the notary in authenticating all his acts; that the correctness of his conduct, in this respect, has never been questioned, and no objection ever made to the reading of them in evidence, before the objection was taken during the trial of the present case, in the parish court. The form of public instruments is regulated by the laws of the country in which they are made; and the protest in this case, lacking the seal, which the law of that state prescribes, it appears to us, ought not to be received in evidence in our courts. The laws of Alabama being produced, we can not be induced to disregard them by any parol evidence to the contrary. There being no evidence of a demand on the drawee, we can not presume one. *De non apparentibus et non existentibus eadem est lex.*

If there was no demand on the drawee, the defendant was not liable. And if, being ignorant that no such demand was made, he thought himself liable, and promised to pay the draft, the promise was made in error, and not binding. The counsel for the plaintiffs has urged, that if the defendant seeks to avail himself of his error, he ought to show that no demand was made. In this conclusion we can not concur. The law does not require impossibilities, and it is not possible to prove that no demand was made. As, however, the justice of the case is probably with the plaintiffs, we think its ends will be promoted by remanding the case for a new trial.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and the case remanded for a new trial, the plaintiffs and appellees paying costs in this court.

A case similar in principle to this decision, so far as regards the effect of a drawer's promise, made in ignorance of facts releasing him, will be found in *Warder v. Tucker*, 5 Am. Dec. 62.

PONTCHARTRAIN RAILROAD CO. v. PAULDING.

[11 LOUISIANA, 41.]

WHERE THE BY-LAWS OF A CORPORATION REQUIRE ITS PRESIDENT to keep all bonds of its officers, for his neglect to take a bond from the secretary, he will be liable for the secretary's defalcation to the extent of the bond which ought to have been given.

ACTION against the president of a railroad company to make him responsible for the defalcation of the secretary. The facts appear from the opinion.

Hoa, for the plaintiffs.

Johnson, *contra*.

By Court, CARLETON, J. The plaintiffs allege in their petition, that one A. B. McLeod, who was appointed their secretary in April, 1834, defrauded them out of the sum of three thousand nine hundred and fifty-five dollars and seventy-four cents, with which he absconded from the country. That it was the duty of defendant, who was at that time president of the company, to have required a bond from the secretary for the faithful discharge of his trust; that by neglecting to do so, and to perform other official duties incumbent on him, he became liable to pay the plaintiffs the sum claimed in their petition. The defendant pleaded the general issue. The cause was submitted to the court, who gave judgment for the plaintiffs. Defendant appealed.

In order to establish the liability of the defendant, the plaintiffs' counsel has called our attention to an article in the rules and regulations of the company, prescribing the duties of the president, in the following words: "It shall be the duty of the president to preside at all the deliberations of the board; to keep, with the secretary, the general cash of the company, and in his special charge, all bonds of officers and other valuable papers; to exercise a general supervision at all times, of the accounts, and of the works and operations of the company, and to recommend to the board of directors, at their weekly meetings, any measures that he may deem it necessary for them to adopt." He also cited a clause in rule third, prescribing the duties of the secretary, wherein it is declared, that "he shall give a bond of five thousand dollars."

It was clearly the duty of some one, or all of the agents of the company, to require a bond from their secretary, otherwise the provision cited from the above regulations would be alto-

gether nugatory. If the defendant, when sued, can shift off the responsibility upon the body of directors, as was attempted in argument; they, in turn, when called to an account, would insist upon the liability of the president; nevertheless, responsibility must rest somewhere.

It is not only required that the secretary should give bond in the sum of five thousand dollars, but the president is made the keeper of that bond; he is moreover invested with a general supervising power, as the chief officer of the institution, and is appointed the immediate guardian of the public moneys, in conjunction with the secretary himself. It is not probable, therefore, that he should have been ignorant that no bond had been given by McLeod. And if he did not conceive it to be his duty to take it himself, it was at any rate incumbent on him to have presented the subject to the consideration of the board.

But it is insisted by defendant's counsel, that the word "bond," as used in the by-laws, does not imply that the secretary shall give security. We can not agree to this interpretation, for he is by implication of law, at all times responsible for malfeasance in office. To take his individual bond therefore, would be doing a vain thing, since it could not add to the obligation already created. We can not doubt that it was the intention of the board, in requiring bond of their secretary, to provide additional security against any loss caused by his misconduct. And such appears to have been the practical construction given to the rule by the defendant himself; for it is in evidence, that on the twenty-third January, 1834, a few days after he was chosen president, E. Rousseau was elected secretary, and gave bond accordingly, with security, which was approved by order of the board, at which the defendant presided.

It is also contended by defendant's counsel, that the rules and regulations for the government of the president and directors have never been legally adopted as their by-laws. The original books of records of the company have been brought into this court, and made part of the evidence in the cause. From thence it appears, that on the sixteenth November, 1832, a committee was appointed to reorganize the affairs of the company, and certain rules indicated in the order were submitted to them. On the nineteenth of the same month, they made a report, which embraced a number of regulations, including those above cited, which were ordered to lie on the table. On

the twenty-sixth they were adopted, and spread out upon the records on the first of December next following.

The defendant was elected president on the seventh of January, 1834, and on that day signed the proceedings of the board in the same book of records, in which his official signature is often found, subsequent to the insertion of the rules and regulations. It appears to us, therefore, that any objection to the validity of these rules comes with a very ill grace from the defendant.

The evidence in the cause shows that the company have been defrauded by their secretary, out of the sum mentioned in the petition, and we think the law is against the defendant. Every one who undertakes the fulfillment of a trust, has before him two alternatives: to perform its duties, or to pay for his neglect. The affairs of every corporation must necessarily be conducted by its officers. A great portion of the wealth of the country is embodied in these institutions, which have of late multiplied beyond all former example. Unless their agents be held to a prompt and vigilant discharge of their trusts, great mischief would inevitably follow.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

MABIRE v. CANAL BANK.

[11 LOUISIANA, 83.]

WHERE THE ACT OF INCORPORATION OMITTS TO PROVIDE how private property shall be taken for the purposes of the corporation, it must proceed according to the provisions of the general laws.

SUCH A CORPORATION INCORPORATED TO CONSTRUCT A CANAL can not, by obstructing natural drains of water, overflow lands adjacent to the line of the canal without making compensation therefor.

ACTION for damages occasioned by the stopping up of drains and ditches by the New Orleans canal and banking company, and thereby overflowing lands of which the plaintiff was the lessee. General denial pleaded. Verdict for the plaintiff for two thousand five hundred dollars. Appeal.

Carter and Roselius, for the plaintiff.

Conrad, contra.

By Court, BULLARD, J. The plaintiff sues for damages which he alleges he has sustained by the overflow of his land, adja-

cent to the new canal, occasioned by the neglect of the defendants to make a sufficient draining ditch parallel to their canal, and the obstruction of the natural drains by embankments. Having recovered a judgment founded on the verdict of a jury, the defendants appealed. They rely for reversal of the judgment principally on a bill of exceptions taken on the trial to the charge of the court to the jury, and to the refusal of the judge to charge as prayed for by their counsel.

The counsel prayed the court to charge the jury: 1. That a corporation can not commit a trespass, or any other offense, nor be made liable therefor; but the party injured has only a right to resort to a personal action against the persons concerned in such trespass or offense.

This ground has been waived by the parties, and requires from us no further notice.

2. That the legislature had a right to authorize the defendants to construct the canal described in their charter, and to invest them with all the powers and privileges necessary to the performance of said work, not prohibited by the constitution, laws, and treaties of the United States, or by the constitution of Louisiana; and particularly that they had a right to empower them to shut any natural drains, when the same was necessary to the execution of the work, and that if any damages should be sustained by individuals in consequence of the exercise of any power thus conferred by law, the company is not responsible for such damages.

3. That if the jury believe that the raising of the water in the swamp adjoining the land was necessarily occasioned by the execution of said work, the company was not bound to drain off the water, except so far as they are expressly required to do so, but are only bound to allow a free passage of the waters of the swamp into and out of said canal.

4. That if they believe that by the terms of the charter the defendants were not bound to make a draining ditch until after the construction of the canal, and of the road upon its margin, and the period within which the company was bound to complete said work has not yet elapsed, no damages can be recovered for their failure to complete said draining ditch, until said works are completed, or said time has elapsed.

The propriety of charging as demanded under the second head, depends upon a previous examination of the charter of the corporation. If that act of the legislature be fairly susceptible of a construction which shows that the intention of

the law-givers was not to confer the extraordinary power and immunities contended for, then it would be useless to inquire whether the legislature could constitutionally confer such powers and immunities on a body corporate. The question would, in that case, become one of mere speculation. It is only when a legislative enactment is manifestly repugnant to the constitution, that the judiciary is authorized to pronounce it not to be the law of the land.

We find no difficulty in declaring, as the opinion of this court, that, if the legislature had merely given to the defendants a corporate name, and authorized them to open a canal of navigation between the city and Lake Pontchartrain, in general terms, without providing for the manner in which private property might be appropriated by them for that purpose, the corporation would be bound to proceed in obtaining the property of individuals for their use, in the manner pointed out in the Louisiana code, article 2604, *et seq.* Such an act of incorporation would not abrogate these provisions of the code, nor authorize the corporation to carry on its operations in such a way as to cause damage to third persons. In the case of *Rabassa v. The Orleans Navigation Company*, this court held that corporations are responsible for every injurious act from which they are not exempted by law: 5 La. 463 [25 Am. Dec. 200].

The question then occurs, has the legislature assumed to exempt the defendants from the usual responsibility imposed by law, and authorized them to obstruct the natural drains of water, so as to cause damage to the adjacent proprietors, without regard to their rights?

The act of incorporation points out the measures to be pursued by the defendants, in order to acquire the land through which the projected canal was to run, and in this respect modifies those provisions of the code above alluded to. The tenth section authorizes the corporation to enter upon, and pass over the land in the vicinity of the canal, and take away timber, wood, shells, earth, and sand, on tendering such previous indemnity as was fixed by appraisers, to be appointed in the manner pointed out by that section, if the parties can not agree. The legislature has thus provided against the abuse of a right of way, over the land contiguous to the line of the canal, and subjected the defendants to a strict responsibility. Nothing but the most clear and unequivocal language could induce us to suppose, that the legislature intended at the same time to authorize the corporation to lay those same lands under water,

over which they could not pass without compensation, by shutting up the natural or artificial channels by which they were previously drained, and that without paying for the damages thus occasioned. No such language is to be found in the act. On the contrary, the fourteenth section provides, that the company shall dig a suitable draining canal on the upper side of the road along the margin of the canal. It may be true, as contended, that the company is not bound to complete the draining canal sooner than the time limited by the charter, so far as the state is concerned, and with reference to a forfeiture of the charter; but it does not follow, in our opinion, that the defendants have a right in the mean time to cause the inundation of the adjacent lands without any compensation to the owners.

The third and fourth propositions are intimately connected with the second, if not corollaries from it, and rest upon the hypothesis that the legislature had conferred upon this corporation an extraordinary exemption from legal responsibility. Being of opinion that the charter is not susceptible of such a construction, we conclude that the court did not err in declining to charge as required.

The charge given by the judge accords in substance with the opinion of this court, just expressed upon the true construction of the act of incorporation; and he added that the legislature had no constitutional right to grant such powers and immunities as the defendants contend for under their charter. Upon this point it will be time to pronounce when the legislature shall have assumed such power. We can not entertain the idea that the legislature will ever sanction the expropriation of, or injury to private property, without a just indemnity.

Upon the merits, the case was submitted to a jury more competent than we can be supposed to be, to estimate the damages sustained by the plaintiff, and we can perceive no good grounds for interfering with their verdict.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

EMINENT DOMAIN.—The decisions and annotations upon this subject appearing in this series are collected in the note to *Varick v. Smith*, 28 Am. Dec. 417, 423.

SMITH v. MISSISSIPPI MARINE AND FIRE INS. CO.

[11 LOUISIANA, 142.]

NO RECOVERY FOR LOSS OF GOODS SHIPPED ON DECK can be had where the application for the insurance did not state that they were so shipped, and the insurers had no knowledge of that fact, although in the bill of lading which was given to the secretary of the company, the fact was stated, it appearing that the secretary did not open or read the bill of lading.

ACTION on a policy of insurance for loss to goods shipped on the deck of a certain vessel. The policy of insurance was general, there being no mention of any deck load. Judgment for the defendant. The facts appear from the opinion.

Strawbridge, for the plaintiffs.

Lockett, contra.

By Court, MARTIN, J. The plaintiffs are appellants from a judgment which rejects their claim against the insurance company, for goods shipped on the deck of the vessel.

They sought to take out their case from the general rule, on an allegation that the defendants knew at the time the insurance was effected, that the goods offered for insurance had been shipped on the deck of the vessel. This, however, the parish judge thought the plaintiffs failed to prove. It appeared that this circumstance was stated in a bill of lading which was left in the company's office. The policy does not state an insurance of goods on deck. It was made according to the written application of the plaintiffs, in which no mention was made of any part of the cargo being on deck. This circumstance was not stated, and the application made no reference to the bill of lading; and it does not appear that the plaintiffs themselves, at the time the insurance was effected, knew that the goods were not in the hold of the vessel, or that any part of the cargo was on deck. From the whole of the testimony and circumstances of the case, it does not appear to us that the parish judge erred.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed, with costs.

GOODS STOWED ON DECK are not covered by a policy on "cargo" or "goods and merchandise:" *Allegre v. Maryland Ins Co.*, 20 Am. Dec. 424. For the jettison of goods so shipped, contribution can not be enforced from the owner of the vessel: *Dodge v. Bartol*, 17 Id. 233 and note; *Smith v. Wright*, 2 Id. 162 and note, unless such goods were so stowed without the knowledge of the shipper, or in pursuance of a usage so to carry them: Note to *Dodge v. Bartol*, *supra*; *Barber v. Brace*, 8 Id. 149.

TIO v. VANCE.

[11 LOUISIANA, 199.]

THE HIRE OR RENT OF A VESSEL IS DUE, when it depends alone on the will of the hirer or lessee to enjoy the thing, or when he has not been prevented from enjoying it by the lessor.

IF CARGO IS DELIVERED AT PLACE OF DESTINATION, the whole freight will be earned, no matter how deteriorated in value by the perils of the sea.

IT IS NOT NECESSARY TO TRANSPORT THE CARGO in the same vessel; in case of necessity arising from *vis major* during the voyage, the captain or owners have a right to repair, if it can be done within a reasonable time, or to employ another vessel and earn the freight.

OWNERS ARE ENTITLED TO FULL FREIGHT, where, on an accident happening to the vessel the first day out necessitating repairs, she was repaired within ten days, and was ready to proceed, but the charterers refused to go on with the voyage.

ACTION to recover full freight of the brigantine Fama. The opinion states the case. Judgment for the plaintiff. Defendants appealed.

Benjamin, for the plaintiff.

Mitchell, contra.

By Court, BULLARD, J. This is an action to recover the hire of the brig Fama, chartered by the defendants for a voyage from New Orleans to Brazos St. Jago, or Tampico. The defendants resist the payment, on the ground that the vessel did not proceed with the cargo, or deliver it at the place of destination, but damaged more than three fourths of it in the river Mississippi, so as to render it impracticable to reship it; that the voyage was thereby broken up, and the damaged portion of the cargo, after having been duly inspected and surveyed by the port wardens, was by them ordered to be sold, and it was so sold for account of the underwriters, and not accepted voluntarily or unconditionally, but merely received by them as agent for the insurers; that the voyage, nor any part of it, was not performed, no transportation or delivery of the cargo was made, according to the terms and stipulations of the charter party, or bills of lading.

The facts established on the trial are, that the brig departed from New Orleans on her voyage on the third of March, and on the fourth, about daylight, struck some obstacle under water, which caused her to spring a leak; that she was leaking so fast that it became necessary to strand her, and having succeeded in partially stopping the leak, it was found expedient to return to

port to repair. She reached the city on the fifth, in the afternoon, and on the seventh they began to discharge the cargo, and finished discharging on the ninth, at noon. It was found that a large part of the cargo was damaged, and was sold by direction of the port wardens, for account of whom it might concern. On the fourteenth of the same month, the defendants were notified by the latter that the brig had finished her repairs and was ready to receive her cargo on board, in order to proceed on her voyage. But the defendants declined putting any cargo on board. It appears that the cargo was too much damaged to be reshipped, at least without being repacked. It is not pretended that the damage done to the cargo was occasioned by the fault or negligence of the captain or crew, or that the vessel was not seaworthy at the time she sailed on the projected voyage.

The obligations of the parties to a contract of affreightment by charter party, spring from the nature of the contract, which is one essentially of letting and hiring. As a general principle, it is well settled, that the hire or rent is due when it depends alone on the will of the hirer or lessee to enjoy the thing, or when he has not been prevented from enjoying it by the lessor: Poth. Contract de Louage; 2 Boulay Paty, 363.

When, therefore, it is asserted that the transportation of the cargo to the port of destination, is a condition precedent, without which the freight or hire can not be recovered, it must be taken with this limitation, that the charterer was not, by his own act, prevented the performance of that condition. If the cargo had been delivered at the place of destination, however deteriorated by the perils of the sea, it is conceded on all hands, that the whole freight would have been earned. It is not of the essence of the contract that the merchandise should be transported in the same vessel, but in case of necessity arising from *vis major* during the voyage, the captain or owners have a right either to repair, if it can be done within a reasonable time, or to employ another vessel and earn the freight. "If the merchant disagrees with this (to use the words of Lord Mansfield), and will not let him do so, the master will be entitled to the whole freight of the full voyage, and so it was determined by the house of lords in the case of *Lutwidge and How v. Gray et al.*:" Ab. Sh. 311. According to these principles, if the *Fama*, after the accident, had put into an intermediate port to repair, and had a few days after offered to proceed on the voyage, having completed her repairs, and this had been de-

elined by the charterers, who, in the mean time, had disposed of the cargo, we do not doubt that the owners would have been entitled to full freight. How is the case varied when the port of departure becomes, as it were, a port of necessity, as in this case? The voyage was begun, and whether the accident happened in the Mississippi or on the coast of Mexico; whether the vessel put back to New Orleans or put into any port between that and the Brazos St. Jago, for the purpose of making repairs and saving the cargo, can not, in our opinion, change the relative rights of the parties.

Lord Ellenborough, who is supposed by the counsel for the appellants to have sanctioned, in one case, a different doctrine, laid down the law, in the case of *Hunter v. Prinsep*, in the following manner: "The ship-owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the sea or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of destination he will pay the stipulated freight; but it was only in that event, viz., of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, or unless there be some new bargain on the subject. If the ship-owner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight, and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all:" 10 East, 378;¹ Ab. Sh. 322. If on a previous occasion his lordship had apparently lent the countenance of his great name to a contrary doctrine, it is not for us to reconcile him to himself. We think ourselves authorized to follow this latter decision as more consonant to the settled maxims of maritime law, and in harmony with the best authorities in France, England, and the United States.

We concur with the counsel for the appellants, that this is not a case in which partial freight might be allowed a *pro rata itineris*. No part of the cargo was, in fact, conveyed to the port of destination, nor was there such a breaking up of the

1. *Hunter v. Prinsep*.

voyage as to create a new implied promise to pay partial freight. The plaintiffs are entitled to the whole or nothing, and we agree with the court below, that the defendants are bound to pay the entire hire of the brig.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

FREIGHT IS NOT DUE as a general rule unless the voyage is completed: *Scott v. Libby*, 3 Am. Dec. 431, where the vessel was turned away from the port of destination by a blockading fleet. And if it has been paid in advance, it must be refunded if without fault of the shipper the goods are never carried to their port of destination: *Griggs v. Austin*, 15 Id. 175. If at an intermediate point the vessel is disabled by perils of the sea, and the master refuses to proceed with the voyage, or to transmit the cargo in another ship, the owner of the goods is not liable to pay on freight: *Welch v. Hicks*, 16 Id. 443.

FREIGHT PRO RATA ITINERIS is due where the owner of the goods voluntarily receives them at an intermediate port: *Welch v. Hicks*, 16 Am. Dec. 443 and note; *Gray v. Wain*, 7 Id. 642; *Hamilton v. Warfield*, 20 Id. 448, and the consent of the owner may be expressly given, or inferred from actions or words: *Gray v. Wain*, *supra*.

PITTS v. SHUBERT.

[11 LOUISIANA, 236.]

RATIFICATION OF AGENT'S ACT.—He who is notified that a contract has been made for him and subject to his ratification by a person who pretended to have authority for that purpose, is presumed to ratify it unless immediately on being informed thereof he repudiates it.

APPEAL. The opinion states the case. Verdict for the plaintiff and judgment thereon.

Roselius, for the plaintiff.

Carter, *contra*.

By Court, MARTIN, J. The plaintiff sues for the restitution of a lot of hogs in the possession of the defendant, of which he alleges the latter wishes to defraud him, or for the recovery of the price. The defendant pleaded the general issue, and averred that he had purchased the lot of Foster, who was authorized by the plaintiff to sell it, and who received payment therefor. There was a verdict and judgment for the plaintiff, and the defendant appealed. The testimony shows that the defendant purchased the hogs from, and made payment for them to Foster, who informed him that they belonged to the plaintiff, and the validity of the sale was to depend on his ratification; that he,

Foster, had been intrusted with them by the plaintiff, and was obliged to sell them, because he was without means of buying corn to feed them. The plaintiff arrived a few days after, and called on the defendant, and was informed by him that he had purchased the hogs of Foster, who told him they were sold for the plaintiff's benefit, and that the validity of the sale depended upon the latter's ratification. The plaintiff did not then disavow the act of Foster, but intimated his intention of pursuing him to recover the money. For this purpose he requested the defendant to aid him by an advance of twenty dollars, which was done, and to furnish him with Foster's receipt as evidence of his claim against the latter. The pursuit of Foster having been neglected or proving fruitless, the present suit was brought.

We are not satisfied with the correctness of the verdict. It appears to us that if the plaintiff intended to disavow the sale by Foster, he ought to have done so immediately on his arrival. He ought not to have played fast and loose, and induced the defendant to forego the immediate pursuit of Foster. No principle is better settled than that he who is notified that a contract has been made for him, and subject to his ratification, by a person who pretended to have authority for that purpose, is presumed to ratify it, unless immediately on being informed thereof, he repudiates it: Dig., lib. 14, tit. 6, l. 16; Part., 5, tit. 1, l. 6, note 2; Merlin's Questions de Droit, verbo Compte Courant, sec. 1; Paillet on the 1985th art. of the Code Napoleon; *Flower et al. v. Jones et al.*, 7 Mart. (N. S.) 143; La. Code, art. 2958.

We have thought it best to have the case submitted to a second jury, especially as the defendant's counsel has urged, that he will be enabled to prove that the money received by Foster from the defendant, has come into the plaintiff's possession.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, the judgment set aside, and the case remanded for a new trial; the costs of the appeal being borne by the plaintiff and appellee.

Followed in *Bonneau v. Poydras*, 2 Rob. 1, 20, in respect to the presumed ratification of an unauthorized act of which the principal has been notified and which he does not repudiate. The same principle is laid down in *Lartigue v. Peet*, 5 Id. 91; and in *Guimbillot v. Abat*, 6 Id. 284, where the limitation is expressed that to charge one as principal on the ground of a ratification presumed from silence, the person seeking to so charge him must show that he has been misled by the silence of the principal, or has been induced to forego some advantage he would otherwise have enjoyed.

FENNESSY v. GONSOULIN.

[11 LOUISIANA, 419.]

A SUIT TO AVOID A JUDGMENT recovered by the defendant against her husband, and the assignment of property in pursuance of it, as being in fraud of the plaintiff's right, is a revocatory action within the meaning of the Louisiana code.

EVERY DEVICE, CONTRIVANCE, OR MACHINATION by which a creditor may have been prejudiced, may be the subject of such an action.

AN ASSIGNMENT PURSUANT TO A JUDGMENT in favor of a wife for her dotal and paraphernal rights, is but a contract, and may be attacked by the husband's creditors for fraud.

MERE ACKNOWLEDGMENT IN A MARRIAGE CONTRACT of the receipt of money, is not conclusive on the husband's creditors.

MORTGAGED PROPERTY, GIVEN IN SATISFACTION of a judgment, is taken subject to the mortgage.

SUIT, in the nature of an hypothecary action, to enforce a judicial action. The opinion states the case.

Bowen, for the plaintiff.

Caillet and Simon, *contra*.

By Court, **BULLARD, J.** The plaintiff alleges, that he is a judgment creditor of Sebastian Castigo, deceased, insolvent; that the present defendant, his wife, had entered with him into a fraudulent combination to place his property beyond the reach of his creditors, and particularly of any execution which might issue on the judgment in favor of the plaintiff; that under the false pretense of having brought into marriage the sum of four thousand two hundred dollars, partly in her own savings, partly in a sum of six hundred dollars, to be paid shortly after the marriage, and a tract of land, and partly in a donation of two thousand four hundred dollars, from Madame Duboucllet, which, he avers, never was paid, although the payment is acknowledged, for fraudulent purposes in the marriage contract, she had recovered a judgment against her said husband for the full amount of four thousand two hundred dollars, which had been satisfied by setting over to her, at its appraised value, all the property of her husband; that the tract of land which she had brought into marriage, estimated at six hundred dollars, had been set over to her in part satisfaction of her judgment, estimated only at one hundred dollars. The plaintiff alleges, that this judgment, to which he was not a party, is null, and he prays it may be annulled on account of the fraud and collusion between the parties, averring at the same time, that the husband had never received the several sums specified in

the marriage contract. The petition concludes with a prayer for a judgment for two thousand dollars damages, and general relief.

In an amended petition, the plaintiff further prays, that the defendant's judgment against her husband, and all proceedings thereon, be annulled, or that the land so received by her at one hundred dollars, be decreed to be sold, and its proceeds, after paying her one hundred dollars, applied to pay the plaintiff's judgment, or that she be adjudged to pay him five hundred dollars, she having, even supposing no fraud to have been committed, received that sum over and above what was due her by her husband. This amended petition also concludes with a prayer for general relief. The defendant denies her liability to pay any debt of her late husband. She alleges, that the plaintiff had full notice of the claims she had upon her husband by her marriage contract, and that notwithstanding the opposition of the plaintiff and other creditors, she obtained a judgment on the twenty-fourth of October, 1824, against him, and that in pursuance thereof, the parish judge, assisted by two experts, had set over to her property to the amount of her claim, and that the judgment is conclusive upon the plaintiff. She further pleads the prescription of one year.

The judgment set up by the plaintiff was rendered on the nineteenth April, 1824, and this suit was instituted on the nineteenth March, 1827. The property was set over to the defendant on the twenty-fourth of January, 1835, in satisfaction of her judgment.

So far as the object of the present suit is to avoid the judgment recovered by the defendant against her husband, and the assignment of property to her, in pursuance of it, as in fraud of the plaintiff's rights, we can regard it in no other light than as a revocatory action, by which, according to the code, creditors may cause to be annulled any contract or transaction, so far as they may have been injured by it. Every device, contrivance, or machination, by which a creditor may have been prejudiced, may form the subject of this action. The assignment made to the wife, of property, though made by the parish judge and experts, in conformity to the judgment, in presence and by the express consent of the parties, must be considered as essentially a contract: a *dation en paiement*. A contract of that description, in consideration of the dotal and paraphernal rights of the wife, is, perhaps, authorized by the code; but, like all other contracts, it is liable to be attacked, as in fraud of other cred-

itors of the husband. The action is, however, prescribed by one year, to run from the date of the judgment which the attacking creditors may have obtained. The evidence does not, in our opinion, authorize a judgment against the defendant, for anything as personally liable for the debt. But the district court thought, that as it appeared in evidence that the plaintiff had a judicial mortgage on the slaves transferred to the defendant under her judgment, he was entitled to have them seized and sold, and rendered judgment accordingly under the prayer for general relief.

No objection was made to the introduction of the evidence, and it is contended that, according to the well-settled doctrine of our jurisprudence, parties are to recover according to their proofs. The plaintiff shows a judicial mortgage on the slaves set over to the defendant, and it does not appear to us she has shown a better right. The mere acknowledgment in a marriage contract of the receipt of money by the husband, is not conclusive against his creditors. There is no proof that the two thousand five hundred dollars, alleged to have been given as a marriage portion, ever was paid to the husband, and the tract of land for which she recovered six hundred dollars, remained her property notwithstanding the estimation in the contract. But the district court went further than merely ordering the slaves to be seized and sold to satisfy the mortgage, and pronounced the nullity of the judgment and transfer. In this respect we think its judgment ought to be reformed. We are bound to consider the defendant as owner of the property set over to her under her judgment, but that the previous mortgage of the plaintiff still subsists on the slaves, and they are liable to be seized and sold to pay the amount.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and proceeding to give such judgment as ought to have been rendered below, it is further ordered and decreed, that the slaves Charles, Agatha, and her children, Eugene, Zenon, and Marie, and also a mulattress named Marie, be seized and sold to satisfy the plaintiff's judgment, to wit: the sum of eight hundred and fifty dollars, with interest at five per cent., from the twenty-fifth of March, 1824, and costs, together with the costs of the district court, those of the appeal to be paid by the plaintiff and appellee.

A JUDGMENT GIVEN TO DELAY OR DEFRAUD CREDITORS is voidable at the instance of creditors: *Mackie v. Cairns*, 15 Am. Dec. 477; *Faris v. Durham*, 17 Id. 77.

BOATNER v. WALKER.

[11 LOUISIANA, 582.]

CONFIRMATION OF A TITLE BY ACT OF CONGRESS is equivalent to a patent, and can only be defeated by a prior title out of the government.

SETTLER'S POSSESSION UNDER DONATION ACT and confirmation of his title is superior to the certificate of the commissioners for the adjustment of land titles, followed by an order of survey and actual survey and location approved by the surveyor-general

SUIT in the nature of a petitory action. The opinion states the case. Verdict for the plaintiff; judgment thereon and appeal.

Lawson, for the plaintiff.

Muse, contra.

By Court, **BULLARD, J.** The plaintiff asserts title to a tract of land, a part of which is alleged to be in possession of the defendant. The evidence of title which he exhibits, consists of a certificate of the commissioners for the adjustment of land titles in the territory east of the island of Orleans, in favor of an actual settler, followed by an order of survey, granted by the register and receiver, and an actual survey and location approved by the surveyor-general.

The defendant sets up title to the premises in dispute, under one Smith, who, he alleges, was a settler, entitled to a donation from the government of the United States, who sold his claim to Silliman, and the latter to White, who conveyed the same to the defendant. He alleges, that he and those from and through whom he holds, have been in possession since 1802. In an amended answer, the defendant sets up a confirmation of his claim, by a special act of congress, passed since the institution of this suit. He further pleads prescription. The plaintiff had a verdict and judgment in his favor, and the defendant appealed.

The act of congress, of the twenty-ninth May, 1830, confirms the claim of the defendant to a tract of land, not exceeding six hundred and forty acres, "it being the place settled by Thomas Smith, and transferred by him to Silliman, by Silliman to White, and by White to Walker." It covers all the land purchased by the defendant from White, and as the sovereign is unlimited as to the mode of granting, this confirmation must be considered as equivalent to a patent. It must, therefore, be regarded as the best title to the disputed premises, unless it can be shown that the plaintiff had a prior title out of the government.

It appears in evidence, that the parties had had a controversy before the register and receiver, in relation to their respective claims. Those officers do not appear to have decided finally upon Smith's claim. They regard it as a neglected one, yet to be acted upon by the government. They say in their decision, that "as defective as the claim of Dr. Walker appears to us to be, we could not without great injustice, run his claim into another's survey, before a final decision is had thereon by government." It is true, they order the plaintiff's claim to be surveyed without regard to a provisional, or as it is called, a conditional, line between the parties, called in the record the Dutton line; but they direct in their order of survey, "that the southern boundary be left for the present, open, until the claim of Dr. Walker be finally decided on." The surveyor-general certifies in a note to his *procès verbal*, that the order of survey required him to designate the line said to have been made between the claims of Boatner and Dr. Walker, so that the same can be laid down on the connected township plat, but that the diagram furnished by him does not show it. The plaintiff has not yet received a patent for the land claimed by him; and his title, in our opinion, ought not to prevail over the title conferred on the defendant by the special act of congress. The record does not show to what precise extent the two claims conflict, but we are of opinion that the defendant has exhibited the best title to all the land purchased by him from White, and described in his conveyance; and as the plaintiff does not show that he, the defendant, is in possession of any other land, judgment must be entered in his favor.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be reversed, and the verdict set aside, and that ours be for the defendant, with costs in both courts.

See *Slack v. Orillion*, *post*.

SLACK v. ORILLION.

[11 LOUISIANA, 587.]

CONFIRMATION BY ACT OF CONGRESS OF TITLE to specific tract of land is equivalent to a patent; but where the boundaries are vague and uncertain, the government may make a valid sale of land not necessarily embraced within the confirmation.

CONFIRMATION OF CLAIM emanating from the former governments of Louisiana is but a relinquishment of title on the part of the government, and parties must look to the primitive title to ascertain the boundaries.

PETITORY action. The case appears from the opinion. Verdict and judgment for the plaintiff. Defendants appealed.

Winchester and Ives, for the plaintiff.

Labauve and Stacy, contra.

By Court, BULLARD, J. In this case our attention has been drawn to the charge of the judge to the jury, which was excepted to by the counsel for the appellants. The jury were instructed, that if the defendants' title, which is derived from the same source as that of plaintiff, was acquired after the confirmation of plaintiff's claim, then he has no title, because the government had already parted with its title, and therefore had none to sell; that the jury had nothing to do with the proceedings or evidence on which the commissioners or congress acted, in granting the confirmation of plaintiff's title, and the certificate of confirmation is sufficient evidence of what it states, and the jury can not go behind these confirmations; and finally, to simplify the question, they were told that when the same land is in contest, a confirmation in 1820, is a better title than a patent granted in 1826, or an auction sale by the United States, after the confirmation.

This charge, we think, was well calculated to mislead the jury as to the merits of this controversy. It is true that when the confirmation by act of congress is specific as to the boundaries and location of the land, the title to which is confirmed by it, and a new title is conferred, we have ruled recently in the case of *Boatner v. Walker* [*ante*, 723], just decided, that it is equivalent to a patent. But when the boundaries of the confirmed claim are vague and uncertain, and are to be fixed by the operations of the surveying department, or are only the recognition of a pre-existing right or claim, and before such survey and location the government sells a part of the land not necessarily embraced within the tract confirmed, we held, in the case of *Lefebvre v. Comeau et al.*, in the western district, 11 La. 321, that the title of the purchaser would prevail.

The defendants hold under three patents from the government of the United States, dated in 1826, for lots of land numbered 26, 27, and 28, on the west side of the Bayou Grosse Tête, "according to the official plat of the survey of said lands, returned to the general land office by the surveyor-general;" no copy of that plat is in the record. But the evidence before us is far from satisfying us that the same land had been previously granted by the government to the plaintiff.

We are of opinion that the court also erred in charging the jury

that they could not look beyond the confirmation of the plaintiff's claim. When the claim confirmed by the commissioners or by act of congress emanated from the preceding governments of Louisiana, the primitive title is merely recognized, and recurrence must necessarily be had to it, in order to ascertain the extent and boundaries of the land. The confirmation, in such a case, operates only as a relinquishment of title on the part of the government. According to these principles, and under the peculiar circumstances of this case, if it be admitted that lots numbers 26, 27, and 28, which had been sold in 1826, according to an official plat, were, in 1830, covered by the survey of the land claimed by the plaintiff, we should conclude that the title of the defendants is best, because at that time the land claimed by them, under the patents, had ceased to belong to the United States, and could not be taken by the surveying department, in order to make up to the plaintiff his quantity; but this is left vague and uncertain. We have not before us the plat of survey upon which the patents issued, nor can we ascertain what changes have since been made, so as to make room for the plaintiff. If such a change has been made, it is not, in our opinion, conclusive upon the defendants.

But the evidence of confirmation of the claims of Franchebois and Reboul is quite unsatisfactory. It appears that their pretensions were once rejected by the commissioners. The parties then claimed, the one two thousand, and the other one thousand superficial arpents, and not acres. They were rejected, because they had only a *requête*, without any evidence of habitation or cultivation, and that their claim was unwarranted by any law, usage, or custom of the Spanish government.

When the claims were afterwards presented to the register and receiver, acting as a board of commissioners, they are stated to be for acres, instead of arpents, and to be founded on orders of survey, issued by the proper Spanish authorities; and those officers declare it to be their opinion that all the claims included under the second species of the first class are already confirmed by the act of congress of the twelfth of April, 1814, without stating that those claims had ever been so claimed. This certificate of an opinion upon the construction of the act of congress is followed by a further certificate of the present register of the land office, who furnishes a copy of it, that it is taken from the reports on land claims in his office, and which reports were confirmed by act of congress of the eleventh May, 1820.

The first certificate does not show that the claims of Reboul

and Franchebois were embraced under the second species of the first class; and the only report which is shown to have been made upon them before the act of congress of 1814, is that in which they are declared to be unfounded, and are consequently rejected. A recurrence to the act of 1814 does not satisfy us that a claim which had been rejected because it was not accompanied by any written evidence of title emanating from the Spanish government, was confirmed by that act: See Land Laws, 651. The certificate of the present register, that the reports of the former board, when it appears that they only reported an opinion that a certain class of claims had already been confirmed without recommending their confirmation, have been confirmed by the act of 1820, is at best but his construction of that act of congress. The first section of the act referred to by the register enacts that the claims for land within the eastern district of the state of Louisiana, described by the register and receiver in their reports of the twentieth November, 1816, and recommended with said report for confirmation, be, and the same are hereby confirmed against any claim on the part of the United States: Land Laws, 778.

The plaintiff purchased only arpents, and he can not recover, in any event, more than he purchased; and we are of opinion that the defendant has a right to give the best evidence in his power of the true extent of the original title under which the plaintiff holds, and we can not presume the government has confirmed a greater extent than his primitive title imported.

We are, however, not prepared to say that the court erred in rejecting, as evidence, copies of the *requêtes*, certified by the register of the land office to be true copies from his register. But we can not concur in one of the reasons given for it, to wit: that as the plaintiff only claimed under the United States, they were not bound to go beyond the confirmation. We have already expressed our views on that point. The offer to produce such copy should have been preceded by such steps as are required by the code of practice, or an opportunity on the part of the plaintiff, allowed to produce the originals.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be reversed, and the verdict set aside; and it is further ordered, that the case be remanded for a new trial, with directions to the judge to abstain from charging the jury upon the points objected to in his former charge, except in conformity with the opinions herein expressed, and that the appellee pay the costs of this appeal.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

KENDALL v. FIELD.

[14 MAINE, 30.]

SHINGLE UPON WHICH A WOODMAN KEPT AN ACCOUNT of the quantity of timber hewn by him in the woods from day to day under a contract with another who took away the timber without a survey, is admissible evidence in an action brought by such woodman's administrator against the employer to recover the value of such labor.

WITNESS IS DISQUALIFIED BY INTEREST FROM TESTIFYING in favor of the defendant in an attachment suit, where the land attached has subsequently been conveyed to such witness with warranty, and by him conveyed to another with warranty.

ASSUMPSIT on an account brought by the plaintiff as administrator. Certain evidence of the account was admitted against the defendants' objection, the nature of which is stated in the opinion. The judge also refused to admit the testimony of one to whom certain land of the defendants, after having been attached in this suit, was conveyed with warranty, and by whom said land had been conveyed to a third person with warranty, on the ground that the witness was interested in the event of the suit. Verdict for the plaintiff, which the defendants now moved to set aside on the ground of error in the rulings above referred to.

W. P. Fessenden, for the defendants.

E. Brown, for the plaintiff.

By Court, **WESTON, C. J.** The plaintiff's intestate was employed by the defendants to hew timber for them in the woods. While there, the intestate entered daily on a shingle, the quantity hewn by him each day. It was taken away by the de-

fendants, without being surveyed, and mingled with other timber. Considering the nature of his employment, and the place where he was, and that the shingle contained the daily minutes of the business in which he was engaged, we think it was legally admissible. It was a substitute for a memorandum book, which answered the purpose at the time, and was, perhaps, as little liable to alteration or erasure, without being detected by the eye, as if made on paper. And we are of opinion, that it was proper evidence to be submitted to the jury, and to be weighed by them, in connection with the other testimony.

The witness rejected was clearly inadmissible on the ground of interest. If the defendants, for whom he was called, had prevailed, their land, which has been conveyed to him since this action, and which he has reconveyed with warranty, would be liberated from attachment. That a witness so circumstanced, is incompetent, although he may have taken a covenant of warranty from his grantor, was decided in *Schillinger v. McCann*, 6 Greenl. 364, to which we refer.

Judgment on the verdict.

ORIGINAL ENTRIES AS EVIDENCE: See the note to *Merrill v. Ithaca etc. R. R. Co.*, *ante*, 130, referring to other cases and notes in this series on the same subject.

BRADLEY v. DAVIS.

[14 MAINE, 44.]

TRESPASS DOES NOT LIE FOR GOODS DELIVERED BY THE OWNER to the defendant, and afterwards sold by the latter to a stranger without authority.

ABUSE OF A LICENSE GIVEN BY THE OWNER of goods does not constitute the licensee a trespasser *ab initio*.

TRESPASS for certain harness. It appeared that an agent of the plaintiff agreed to sell the harness to the defendant, and delivered the same to him upon condition that he was to pay part of the purchase money, and give security for the residue on the Monday following the agreement, and that the defendant took away the property, promising to return it on Monday, if he did not by that time make payment and give security as agreed. He did not make payment, nor give security as agreed; nor did he return the property, but sold it to a third person. There was no proof of a demand. The judge who

tried the cause instructed the jury that trespass would lie. Verdict for the plaintiff, which the defendant moved to set aside for misdirection.

J. Appleton, for the defendant.

Rogers, for the plaintiff.

By Court, *WESTON*, C. J. The general property in the harness being in the plaintiff, drew after it such a constructive possession in him, as would enable him to maintain trespass against a stranger. The bailee being answerable to the general owner, may also bring trespass; and the right to maintain it attaches in him, who first brings the action. But a party shall not be charged as a trespasser for goods, which he received by delivery from the owner. *Williams*, in his notes to *Saunders*, 2 Saund. 47, note 1, says, that where the taking is lawful or excusable, trespass can not be supported; but the owner must bring trover. And such was the opinion of the court in *Cooper v. Chitty*, 1 Burr. 20, and in *Smith et al. v. Milles*, 1 T. R. 475. In *Ex parte Chamberlain*, 1 Sch. & Lef. 320, Lord Chancellor Redesdale says that trespass can not be brought for goods that were lawfully delivered.

If a party comes to the possession of goods lawfully, for any subsequent unlawful conversion of them, the appropriate remedy is trover. And this action will lie, where trespass will, for the unlawful taking is a conversion. But Serjeant *Williams*, in the note before cited, says, that the converse of this proposition is not true. It has been ingeniously argued by the counsel for the plaintiff, that any act is a trespass, in relation to the goods of another, for which there is no justification or excuse. But the remedy for every such act, is not trespass *vi et armis*. That would be confounding all distinction between trespass and trover. Every unlawful conversion, is without justification or excuse. If a man hires a horse to use two days, and he continues to use him the third day, it could hardly be contended that trespass would lie; although such use would be unlawful; and the owner would be entitled to the immediate possession. Yet being the general owner, and as such having a constructive possession, he might undoubtedly maintain trespass against a stranger, who should presume to use the horse on the third day. The ground of distinction is, that the taking by the stranger, would be tortious from the first. If A. permits his goods to remain with B. for his own use, and B. delivers them to C. to carry to another place, trespass does not lie by A. against C.:

6 Com., Trespass, D. The reason is, that B. had the goods by delivery from the owner.

In the *Six Carpenters' case*, 8 Co. 146, it was resolved, that whoever abuses an authority or license derived from the law, becomes thereby a trespasser *ab initio*; but that it is otherwise, where the license or authority is derived from a party. And Baron Comyns deduces from that case the general principle, that if a man has license or authority from the plaintiff himself, trespass does not lie against him, though he abuses his license by misfeasance: 6 Com., Trespass, D.

The opinion of the court is, that upon the facts in the case, an action of trespass can not be supported.

Verdict set aside.

ABUSE OF AUTHORITY CONSTITUTES ONE A TRESPASSER AB INITIO, WHEN.—This subject is considered in the note to *Barrett v. White*, 14 Am. Dec. 365. See also *Barrett v. Lightfoot*, 15 Id. 110.

TRESPASS FOR GOODS WITHOUT DEMAND.—In *Stanley v. Gaylord*, 1 Cush. 536, it was held, that where a bailee of a chattel having no authority as against the owner to retain or dispose of it, mortgages it as security for his own debt, and the mortgagee takes possession, the owner may have trespass against him without a demand. Wilde, J., however, dissented, and referred to the principal case as an authority to the contrary.

HEATON v. HODGES.

[14 MAINE, 66.]

SURVEY ACTUALLY MADE GOVERNS THE LOCATION of land granted with reference to a plan, if such survey can be ascertained.

LENGTH OF LINE GIVEN ON A PLAN, exactly measured according to the scale upon which the plan is drawn, is to govern, in such a case, if no survey was made or can be shown, and the lines were not drawn with reference to natural monuments, although it appears that in other parts of the plan a liberal system of measurement was applied. Accordingly, where a line is given in a grant as extending a specified distance to a stone monument which can not be found, and such line so given, or the line given on the plan to which the grant refers, exactly measured according to the scale of the plan, does not include a particular parcel of land, the grantee can not recover such parcel, although by a liberal measurement according to the ratio appearing from other parts of the plan, such parcel would be within the grant.

WRIT of entry counting on the seisin of the demandants. The question at issue, and the facts relating to it, are sufficiently stated in the opinion, except that it appeared, in addition to what is there stated, by measuring some of the lines upon the

plan referred to in the grant under which the tenant claimed, and comparing them with the lines upon the ground described in the grant as extending to certain known monuments, the surveyors had allowed an excess of about twelve per cent. over the scale of one hundred and sixty rods to the inch, upon which the plan was protracted, and that, if the same excess were allowed to the particular line in dispute in this case, the demanded premises would fall within the tenant's grant. Verdict for the demandants, under instructions substantially in accord with the following opinion. The tenant moved to set aside the verdict on the ground of error in the instructions.

Mellen and Abbott, for the tenant.

J. McGaw and F. H. Allen, for the demandants.

By Court, WESTON, C. J. The title of both parties originates from the same source. But the tenant deduces his from an elder grant; and he has a right therefore to have his lot located according to that grant, whether it does or does not conflict with the title of the demandants. The starting point at Penobscot river, from which the line in controversy is to be run, and the course of that line are known and agreed. By the grant, under which the tenant claims, that line was to be five miles and one hundred and eighty-four rods in length, and to terminate at a stone monument. That monument, or the place where it stood, can not now be ascertained. If the terminating point is not to be located more than five miles, one hundred and ninety-eight rods and twenty links from Penobscot river, the demandants have prevailed in their action.

The grant before stated was made or confirmed with reference to a plan. It was understood on both sides at the trial, that there was not to be found on that plan, any scale, by which it was delineated. It has since been discovered, by a more thorough examination, that it was protracted upon a scale of one hundred and sixty rods to an inch. And it appears, that the length of the line in dispute, as there laid down, is exactly eleven inches. This is equal only to five miles and a hundred and sixty rods. Whether, upon this state of facts, the length of line, as deduced from the plan, or that which is actually given in the grant, is to govern, we are under no necessity of determining. If the tenant is to be restricted to either, upon exact measure, he fails in his title. But it is contended, that from the plan, and other facts proved at the trial, such large measure should be accorded to him, as would give him the demanded premises.

And there is reason to believe, from those facts, as well as from the known and acknowledged liberality of admeasurement in the surveys of that period, that such would be the result, applying to this line the same ratio of extension and enlargement. And if this were a question now for the first time presented, not having been before settled by the decisions and practice of our courts, the argument, submitted by the senior counsel for the tenant, would be entitled to great weight and consideration. But a different rule having heretofore been adopted, we feel constrained to regard it as no longer an open question.

It is of the highest importance, that settled rules of law, affecting the title to real estates, should be adhered to and preserved. The true location of lots of land, made with reference to plans, as ancient as that under consideration, delineating lines, some of which had been made from actual survey, and others plotted without being surveyed, has frequently been before the supreme judicial court, both before and since our separation. We have understood the rule applied in such cases has been, that the survey actually made, if it can be ascertained, is to govern the location. But if that could not be shown, or if none was made, and the lines were not drawn with reference to natural monuments, they were to be settled by the length of line given on the plan, according to its scale, exactly measured. It may have been deemed, that a departure from this rule, would be productive of too much uncertainty, from the want of uniformity in the excess of admeasurement allowed by different surveyors, as well as in that, which may have been made by the same surveyor.

We have been referred to no adjudged case in the reports, presenting this question, prior to the separation. A decision, however, was made upon it by the whole court, in *Bowman v. White*, in 1801, prior to the commencement of the Massachusetts reports, which is noticed in *Loring v. Norton*, 8 Greenl. 61. Since the separation, the case of the *Proprietors of the Kennebec Purchase v. Tiffany*, 1 Id. 219 [10 Am. Dec. 60], may be regarded as being directly in point. The tenant's title there, depended upon Winslow's plan, made in 1761. Winslow surveyed and fronted the lots on Kennebec river, there marking the corners of each; and upon this base, he platted on his plan three tiers or ranges of lots, west of the river, each represented by the scale on the plan, as one mile in length, and fifty rods in width; but he did not actually run any lines, or make any corners, except

at the river. The space between the corners of each lot at the river was generally found to be fifty-four rods instead of fifty.

It thus appeared that the excess of admeasurement made by Winslow, was about eight per cent. Accordingly when Dr. McKecknie was employed by the proprietors, seven years afterwards, to survey a tract further west, but adjoining that laid down on Winslow's plan, in order to ascertain the westerly line of Winslow's lots, he measured three miles and seventy-two rods, instead of three miles, allowing about the same excess which Winslow did in his survey on the river. We are not aware that a single argument has been urged in favor of liberal admeasurement in the case before us, which did not apply with equal force in that case. Winslow's rod was proved to be longer by four parts in fifty, than the exact rod. His rod was necessarily applied, in ascertaining the width of each lot, and why was it not adopted also in ascertaining its length? McKecknie, an experienced surveyor of that day, so applied it. But the court overruled this practical, but subsequent location, made in that early day, by a surveyor of the proprietors, and applied the exact rod to Winslow's scale, in determining how far his lots should extend westerly from the river. The late chief justice of this court, who had been many years in extensive practice, prior to our separation, sustains his opinion in that case, by a reference to the application of the same rule to a tract of land, on the eastern side of the river. The result was, that on both sides, upon the principle of exact measurement, the proprietors succeeded in establishing their claim to a strip of land between tracts, before supposed by their surveyors and themselves to have been contiguous. A stronger case for the application of the rule now contended for can not well be imagined. And yet we doubt not both those decisions were in accordance with what had been previously settled and decided in Massachusetts. *Loring v. Norton*, where the opinion of the court was delivered by Judge Parris, was decided upon the same principles.

In the case under consideration, neither the length of line given in the grant, nor deduced from the plan, exactly measured, will give the tenant any part of the land defended; and in our judgment no other rule than that of exact measurement, can be legally applied.

Judgment on the verdict.

RULES GOVERNING WHERE DESCRIPTION OF LAND IS INCONSISTENT OR UNCERTAIN.—The intention of the parties to a deed as well as to any other contract,

is the touchstone by which to determine the proper construction of the contract, and this principle applies to the description of the premises conveyed as well as to other parts of the contract. In case, therefore, of any conflict or ambiguity in the contract, the aim of the court is to discover from the instrument itself what property was meant to be conveyed thereby; and the object of all the rules of construction which have been applied to this part of a deed is simply to assist in ascertaining the intention.

PARTS OF DESCRIPTION WHICH ARE MOST CERTAIN PREVAIL.—In accordance with the general rule already referred to, that the intention is the guide in determining what land is conveyed by a deed, it is an established principle, that where there are two conflicting descriptions of the premises in the deed, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the land: *Den v. Graham*, 27 Am. Dec. 226; *Newsom v. Pryor's Lessee*, 7 Wheat. 7; *Vance v. Foré*, 24 Cal. 435; *Reed v. Spicer*, 27 Id. 57; *Piercy v. Crandall*, 34 Id. 334; *Abbott v. Abbott*, 53 Me. 356; *Johnson v. McMillan*, 1 Strob. 143; *Bass v. Mitchell*, 22 Tex. 285; *Robertson v. Mosson*, 26 Id. 248; *Gates v. Lewis*, 7 Vt. 511. Particularly where one of the descriptions or parts of the description is expressed in certain and definite terms, while the other is vaguely and uncertainly stated to be "about" a certain distance, or the like: *Ricker v. Barry*, 34 Me. 116. If the two conflicting descriptions are equally stable and certain, that which is most favorable to the grantee is to be preferred: *Vance v. Foré*, 24 Cal. 435.

PARTICULAR DESCRIPTION PREFERRED TO GENERAL, WHEN.—Where a deed contains two descriptions of the same premises, one particular and definite, showing the precise location and bounds of the land, and the other general in its terms, and they conflict, the former controls, for the reason that a description which undertakes to set out the specific boundaries is more likely than a vague general description to have been carefully attended to by the parties, and to be in accordance with their intention: *Herrick v. Hopkins*, 23 Me. 217; *Gano v. Aldridge*, 27 Ind. 294; *Nutting v. Herbert*, 35 N. H. 120; *McEwen v. Lewis*, 26 N. J. L. (2 Dutch.) 451. Thus, where the land is described as "the piece of land called the cross-lot, etc., now in the possession of," etc., and is also further particularly described by permanent boundaries, and the two descriptions do not agree, the latter will be preferred: *Jones v. Smith*, 73 N. Y. 205. But where the particular description is in any degree obscure or uncertain, the general description may be resorted to for the purpose of establishing the identity of the premises: *Herrick v. Hopkins*, 23 Me. 217; *Peaslee v. Gee*, 19 N. H. 273; *Sawyer v. Kendall*, 10 Cush. 241; and items of the particular description which do not harmonize with the general description may be rejected: *Peaslee v. Gee*, *supra*. Indeed, wherever the general description is clear, definite, and certain, the particular description will not control it, especially where the latter is doubtful in some of its terms: *Ela v. Card*, 9 Am. Dec. 46; *Barney v. Miller*, 18 Iowa, 460. Thus, where the land is generally described by a well-known name, and also particularly by metes and bounds which are erroneous in part, the whole, known by the name referred to, will undoubtedly pass: *Haley v. Amestoy*, 44 Cal. 132.

So where the tract is first generally described as "being the same premises conveyed" to the grantor by a certain deed, and then the conveyance attempts to give the metes and bounds, but omits a part of the premises conveyed in the first deed, the whole tract nevertheless passes: *Foss v. Crisp*,

20 Pick. 121; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66. Accurately speaking, however, both the descriptions are particular in such a case, since the boundaries may be ascertained by referring to the prior deed. A conveyance describing the land as the grantor's "homestead farm," and then setting out a particular description of the parcels of which it is composed, in which several acres are omitted, passes the whole farm: *Andrews v. Pearson*, 68 Me. 19. The same principle is applied in *Marshall v. McLean*, 3 Iowa, 363. It is obvious in such cases that the general description, or the description of the tract as a whole, really points out the property which the parties had in view; and their intention that it should pass by the deed ought not to be frustrated by a mistake in setting out the specific boundaries. Hence, whether the general or the particular description be preferred, the reason is the same. The description which conforms to the manifest intention of the parties must control. A description of a town lot by its number and the number of the block, followed by a description by metes and bounds including only a part of it, carries the whole lot: *Rutherford v. Tracy*, 48 Mo. 325. So a description by number will control a reference to adjacent streets, the latter being regarded as incidental: *Nash v. Wilmington etc. R. R. Co.*, 67 N. C. 413; and will correct a mistake in the courses and distances bounding the lot: *Jackson v. Marsh*, 6 Cow. 681. So such a description will control a more general description of the lot as "the same land now occupied" by the grantor: *Spiller v. Scribner*, 36 Vt. 245. On the other hand, a description by number may be limited by a description by monuments, courses, and distances: *Haynes v. Young*, 36 Me. 557.

FALSE PARTICULARS REJECTED.—A description which is sufficient to identify the premises, and is in accord with the obvious intention of the contracting parties, will not be vitiated by the insertion of erroneous calls for monuments or other particulars which are repugnant to that description; but such erroneous or mistaken particulars will be rejected as "false demonstration," and the tract, as described by the remaining consistent particulars, will pass. *Wendell v. Jackson*, 22 Am. Dec. 635, per Walworth, chancellor; *Wade v. Deray*, 50 Cal. 376; *Andrews v. Murphy*, 12 Ga. 431; *English v. Roche*, 6 Ind. 62; *Myers v. Ladd*, 26 Ill. 415; *Kruse v. Wilson*, 79 Id. 233; *Voce v. Bradstreet*, 27 Me. 156; *Beal v. Gordon*, 55 Id. 482; *Thatcher v. Howland*, 2 Met. 41; *Bond v. Fay*, 12 Allen, 86; *Doane v. Wilcutt*, 16 Gray, 368; *Gibson v. Bogy*, 28 Mo. 478; *Cooley v. Warren*, 53 Id. 166; *Shewalter v. Pirner*, 55 Id. 218; *Lyman v. Loomis*, 5 N. H. 408; *Harvey v. Mitchell*, 31 Id. 575; *Johnson v. Simpson*, 36 Id. 91; *Lane v. Thompson*, 43 Id. 320; *Jackson v. Clark*, 7 Johns. 217; *Seaman v. Hogeboom*, 21 Barb. 398; *Eggleston v. Bradford*, 12 Ohio, 312; *Raymond v. Coffey*, 5 Or. 132; *Berry v. Wright*, 14 Tex. 270; *Bass v. Mitchell*, 22 Id. 235; *Hull v. Foster*, 7 Vt. 100. Thus, where personal property mortgaged is correctly described in the mortgage, except that the location of the mill containing it is erroneously stated, that particular of the description may be rejected: *Myers v. Ladd*, 26 Ill. 415. So, where the description of premises conveyed by a deed is correct in every part, except that one of the courses is described as running "north-westerly" along a certain road, which, in fact, runs north-east, the word "north-westerly" may be rejected, and the land as identified by the remainder of the description will pass: *Kruse v. Wilson*, 79 Id. 233. So, "east" may be construed to mean "west:" *Mizell v. Simmons*, 79 N. C. 182. Where a description of the premises intended to be conveyed is followed by an exception which is uncertain, such description being otherwise consistent and correct, the exception may be rejected: *Thayer v. Torrey*, 37 N. J. L. (8 Vr.) 339. Other illustra-

tions of the application of the rule will be found in the cases above cited in support of it. But no part of a description is to be rejected unless absolutely necessary to uphold the deed. Every call must be answered if possible, none being omitted if all can stand together: *Herrick v. Hopkins*, 23 Me. 217. Where there are several particulars given in a conveyance, all of which are necessary to identify the property, nothing will pass which does not satisfy every particular: *Wendell v. Jackson*, 22 Am. Dec. 635, per Walworth, chancellor; *Jackson v. Clark*, 7 Johns. 217; *Worthington v. Hylyer*, 4 Mass. 196.

MONUMENTS PREFERRED TO COURSES AND DISTANCES.—As a result of the general rule already referred to, that where different parts of the description in a deed or patent conflict, those particulars which are most stable and certain, and least liable to be mistaken, are to prevail, it has long been the established rule of construction that a description of boundaries by known and visible natural or artificial monuments or landmarks, is generally to be preferred to a description by courses and distances and other measurements. A principle of law, so well and so long settled, does not require the citation of authorities to support it. The following cases in which this rule is enforced are referred to, not so much to sustain it as to illustrate its various applications: *Howe v. Bass*, 3 Am. Dec. 59; *Dale v. Smith*, 12 Id. 64; *Bryan v. Beckley*, Id. 276; *Doe v. Paine*, 15 Id. 507; *Wendell v. Jackson*, 22 Id. 635, per Walworth, Chancellor; *Hurley v. Morgan*, 28 Id. 579; *Piercy v. Grandall*, 34 Cal. 334; *Paris v. Phelan*, 39 Id. 612; *Nivin v. Stevens*, 5 Harr. (Del.) 272; *Gaveny v. Hinton*, 2 G. Greene, 344; *Young v. Leiper*, 4 Bibb, 503; *Preston's Heirs v. Bowmar*, 2 Id. 493; *Emery v. Fowler*, 38 Maine, 99; *Robinson v. White*, 42 Id. 209; *Beal v. Gordon*, 55 Id. 482; *Oxton v. Graves*, 68 Id. 371; S. C., 28 Am. Rep. 75; *Heck v. Remka*, 47 Md. 68; *Pernam v. Wead*, 6 Mass. 131; *Makepeace v. Bancroft*, 12 Id. 469; *Blaney v. Rice*, 20 Pick. 62; *Phillips v. Bowers*, 7 Gray, 21; *Bosworth v. Sturtevant*, 2 Cush. 392; *Morse v. Rogers*, 118 Mass. 572; *McGill v. Somers*, 15 Mo. 80; *Kronenberger v. Hoffner*, 44 Id. 185; *Kellogg v. Mullen*, 45 Id. 571; *Smith v. Dodge*, 2 N. H. 303; *Coburn v. Coexter*, 51 Id. 158; *Cunningham v. Curtis*, 57 Id. 157; *Opdyke v. Stephens*, 28 N. J. L. (4 Dutch.) 83; *Cudney v. Early*, 4 Paige, 209; *Smith v. McAllister*, 14 Barb. 434; *White v. Williams*, 48 N. Y. 344; *Cherry v. Slade's Adm'r*, 3 Murph. 82; *Campbell v. Branch*, 4 Jones L. (N. C.) 313; *West v. Shaw*, 67 N. C. 483; *Graybeal v. Powers*, 76 Id. 66; *Lewis v. Lewis*, 4 Or. 177; *Blasdel v. Bissell*, 6 Pa. St. 258; *Thompson v. McFarland*, Id. 478; *Dawson v. Mills*, 32 Id. 302; *Lodge v. Barnett*, 46 Id. 477; *Coats v. Matthews*, 2 Nott & M. 99; *Johnson v. McMillan*, 1 Strob. 143; *McAdoo v. Sublett*, 1 Humph. 105; *Hale v. Darley*, 10 Id. 92; *Funa v. Manning*, 11 Id. 311; *Lewis v. Oakley*, 10 Heisk. 483; *Urquhart v. Burleson*, 6 Tex. 502; *Hubert v. Bartlett*, 9 Id. 97; *Mitchell v. Burdett*, 22 Id. 633; *Robertson v. Mosson*, 26 Id. 248; *Welder v. Hunt*, 34 Id. 44; *Keenan v. Cavanaugh*, 44 Vt. 268; *Newsom v. Pryor's Lessee*, 7 Wheat. 7; *Cleveland v. Smith*, 2 Story, 278.

The reason of the rule is plain. Monuments are facts visibly indicating the extent of the land and the directions of its bounding lines. The courses and distances, as laid down in the deed or plat or field notes, are merely descriptive of the facts. They are necessarily based upon measurement, estimation, and mathematical calculation. Their accuracy depends upon the skill of the surveyor, and they may not be in accord with subsequent surveys. The monuments, however actually found or placed upon the ground, are always, so long as they continue to exist, in the same direction and at the same distance from each other. See *McClintock v. Rogers*, 11 Ill. 279,

where Caton, J., gives substantially this account of the reasons for the adoption of the rule. The lines marked out on the ground constitute the actual survey. The draft of those lines in the plat, and the description of them in the deed, are only evidence of the survey: *Comegys v. Carley*, 27 Am. Dec. 356; *Riddlesburg Iron and Coal Co. v. Rogers*, 65 Pa. St. 416. It is, therefore, in accordance with sound legal principles that the lines as thus actually marked out by visible monuments should prevail over the description of those lines, where they differ. The rule is founded upon the same principle which makes an original paper better evidence than a copy of it. Not only, therefore, are the lines actually run by the surveyor and designated by monuments found already existing or placed there by such surveyor superior to the courses and distances laid down in the deed, but they prevail also over the plan or plat of the survey referred to in the deed: *Emond v. Tarboz*, 20 Am. Dec. 346. Monuments established or marked on the ground, and recognized for twenty years or more as designating the true boundary, will prevail also over a description of the original laying out of the land contained in the proprietor's records: *Richardson v. Chickering*, 41 N. H. 380. The existence of marked lines obviates a mistake in the plat, certificate of survey and grant, in calling "west," "north," and the like: *Woods v. Kennedy*, 5 T. B. Mon. 174. So a line which is actually marked part of the way, though not a right line from corner to corner, will control the boundary, and such boundary for the residue of the distance will be a direct line to the corner or point of intersection called for: *Cowen v. Fauntleroy*, 2 Bibb, 261; *George v. Thomas*, 16 Tex. 74; *Thornberry v. Churchill*, 16 Am. Dec. 125. Where there are no express calls to fix the location of a line with certainty, it is held in *Kronenberger v. Hoffner*, 44 Mo. 185, that evidence *aliunde* is admissible to show where the line was run, and that then it will control courses and distances laid down in the survey and deed.

Monuments subsequently erected by the parties to a conveyance by mutual consent, as being those called for therein, will control specifications of quantity and courses and distances: *Makepeace v. Bancroft*, 12 Mass. 469; *Emery v. Fowler*, 38 Me. 99. So a plan made and recorded by the grantor soon after executing the conveyance will control a distance described in the deed with the qualification of "more or less:" *Blaney v. Rice*, 20 Pick. 62.

ORDER OF PREFERENCE AMONG MONUMENTS.—For the reason that natural monuments, such as rivers and the like, are generally of a more permanent and notorious character than artificial monuments, the rule is that recourse must be had to the natural rather than the artificial monuments called for in a deed, where they conflict: *Seaman v. Hogeboom*, 21 Barb. 398; *Colclough v. Richardson*, 1 McCord, 167; *Hubert v. Bartlett*, 9 Tex. 97; *Bolton v. Lann*, 16 Id. 96. See also *Avery v. Baum*, Wright (Ohio), 576; and *Hurley v. Morgan*, 28 Am. Dec. 579. But it is only because natural monuments are deemed more certain, and more likely to have been chiefly regarded by the parties, that they are preferred to artificial monuments. Hence, where the artificial monument, in a particular case, is obviously the more certain, it will be preferred. Thus, a reference to a lot upon a particular plan may control a reference to the shore of a river: *Lincoln v. Wilder*, 29 Me. 169. It is laid down in *Patton v. Alexander*, 7 Jones Law, 603, that one kind of natural objects is, in such cases, entitled to no more respect than another. This may be so as a general rule; but it can not be doubted that cases may happen in which a reference to one kind of natural monument would be deemed more certain than a reference to a different kind.

ILLUSTRATIONS OF KINDS OF MONUMENTS HELD CONTROLLING.—In addition

to monuments of the more conspicuous and permanent character, the following may be mentioned as examples of those which have been recognized as having a controlling effect in construing descriptions in deeds, patents, etc. A public road may be such a monument: *Chatham v. Brainerd*, 11 Conn. 60; and a boundary described as extending to such road will be construed to run to the middle line thereof, although the distance given will reach only to the side of the road: *Oxton v. Groves*, 68 Me. 371; S. C., 28 Am. Rep. 75; *Phillips v. Bowers*, 7 Gray, 21. So a railroad is a continuing monument: *Miller v. Beeler*, 25 Ill. 163. So the street of a city, and if such a street is made a boundary, the courses given in the deed will be varied to conform to it: *Faris v. Phelan*, 39 Cal. 612. Where the line or corner of a street is referred to as a monument, if the street is not laid out and opened, but merely surveyed, a mathematical line or corner is intended; but if the street has been opened and built on, the line as built on is meant: *Haring v. Van Houten*, 22 N. J. L. 61; *Smith v. State*, 23 Id. 130; *De Veney v. Gallagher*, 20 N. J. Eq. 33. So a farm may be a monument: *Cate v. Thayer*, 3 Greenl. 71. So a lot of a designated number in a city: *Lincoln v. Wilder*, 29 Me. 169; *Rutherford v. Tracy*, 48 Mo. 325; *Sayers v. City of Lyons*, 10 Iowa, 249. So the corner of a subdivision of the United States survey: *Powers v. Jackson*, 50 Cal. 429; and it will control as against a stake established by the grantor at a different point as designating such corner: Id. So a stable: *White v. Williams*, 48 N. Y. 344. So a stake driven into the earth, if it can be found, will control courses and distances: *Call v. Barker*, 12 Me. 320. So where stakes are fixed at the corners of lots in a town, and purchasers take possession in accordance therewith, they will control as against the town plat between such purchasers: *Marsh v. Mitchell*, 25 Wis. 706. So stakes established at the corners of blocks, will control the description of lots therein as containing a certain area in an unrecorded town plat: *Fleischfresser v. Schmidt*, 41 Id. 223.

But it is held, in *Cox v. Freedley*, 33 Pa. St. 124, where a line was described as running to a street and also to a stake, that "so frail a witness" as a stake, "is scarcely worthy to be called a monument" so as to control the rule of law that a grantee of land on a street takes to the center of the street. A line described as running to a "pond to a stake and stones," extends to the stake and stones if they can be found, otherwise to the pond: *Robinson v. White*, 42 Me. 209. The line of an old survey or of an adjoining tract called for in a deed, is a controlling monument, and must be run to regardless of distance, unless a contradictory call for some natural object intervenes: *Umbarger v. Chaboya*, 49 Cal. 526; *Pennington v. Bordley*, 4 Har. & J. 450; *Carroll v. Norwood's Heirs*, 5 Id. 155; *Howell v. Merrill*, 30 Mich. 283; *Whitelsey v. Kellogg*, 28 Mo. 404; *Cunningham v. Curtis*, 57 N. H. 157; *Northrop v. Sumney*, 27 Barb. 196; *Cherry v. Slade*, 3 Murph. 82; *Gilchrist v. McLaughlin*, 7 Ired. L. 310; *Dula v. McGhee*, 12 Id. 332; *Cansler v. Fite*, 5 Jones L. 424; *Graybeal v. Powers*, 76 N. C. 66; *Craft v. Yeane*, 66 Pa. St. 210; *McAdoo v. Sublett*, 1 Humph. 105; *Bolton v. Lann*, 16 Tex. 96; *Anderson v. Stamps*, 19 Id. 460. So, it is said, whether the line called for is a marked line or must be determined by courses and distances: *Corn v. McCrary*, 3 Jones L. 496, *Cansler v. Fite*, 5 Id. 424. But it is held in *Howell v. Merrill*, 30 Mich. 283, that where a third person's line is called for it will not control unless definitely fixed, marked, and known. The true line of the adjoining land is called for in such a case, and not the understood line: *Umbarger v. Chaboya*, 49 Cal. 526. Where natural objects and an old survey line are referred to under the mistaken supposition that they correspond, but the elder line can be ascertained only by compass and chain, while the natural objects

are clearly identified, the latter will control: *Hare v. Harris*, 14 Ohio, 522. In case the distance called for gives out before reaching the line of an adjoining tract called for in the deed, and if the distance, however prolonged in the course called for, will not touch the adjoining land, it is determined, in *Campbell v. Branch*, 4 Jones L. 313, that both course and distance must be disregarded, and the line must be run from the last corner to the nearest point in the line of the adjoining land, unless prevented by some other call in the deed. Where a grantor conveys two lots to different purchasers, out of a larger tract, describing them by lines run from opposite corners of the tract in such a direction that they will meet if prolonged, and it appears that they were intended to meet, they will be run to connect with each other, without regard to distance, the intervening distance being divided between the grantees in proportion to the given length of their respective lines: *Lincoln v. Edgcomb*, 28 Me. 275.

RULE THAT MONUMENTS CONTROL, NOT INFLEXIBLE.—There is no magic in a monument which will give it invariable control in such cases. It controls only because it is regarded as more certain than a given course or distance. If it should, in a given case, be less certain, the rule would fail with the reason for it, and the monument would yield to the course and distance, and an artificial monument will yield more readily than a natural one: *Higinbotham v. Stoddard*, 72 N. Y. 94. The doctrine that monuments prevail over courses and distances is never adhered to when it would lead to an absurdity: *Davis v. Rainsford*, 17 Mass. 207; nor where it would defeat the grant, when, by rejecting a call for one or more monuments, the deed may be upheld and the manifest intent of the parties made effectual: *White v. Luning*, 93 U. S. 515; *Hamilton v. Foster*, 45 Me. 32; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Buffalo etc. R. R. Co. v. Stigeler*, 61 Id. 348; *Bradford v. Pitts*, 2 Const. 115; *Colclough v. Richardson*, 1 McCord, 167; *Hubert v. Bartlett*, 9 Tex. 97; *Jones v. Burgett*, 46 Id. 284. Generally monuments control only so far as necessary to give effect to the apparent intent: *Johnson v. McMillan*, 1 Strob. 143. And monuments called for as "supposed" to be so and so, or as being "near" the intended line, are not sufficiently certain to prevail over definite courses and distances: *Den v. Graham*, 27 Am. Dec. 226; *Canaler v. Fite*, 5 Jones L. 424; *Mizell v. Simmons*, 79 N. C. 182. In case of doubt as to which of two or more natural objects of the same kind is the one called for in the deed, the course and distance may be used as a guide to determine which is meant: *Doe v. Paine*, 15 Am. Dec. 507. But the course is not to be followed regardless of other considerations in such a case: *Spruill v. Davenport*, 1 Jones L. 203.

COURSES AND DISTANCES are the next most certain items of description after calls for monuments, natural or artificial, to which alone they yield: *Chadbourn v. Mason*, 48 Me. 389. In the absence of calls for monuments, therefore, or if the monuments called for can not be found, the courses and distances control quantity and all other less definite terms of description: *Bradford v. Hill*, 1 Am. Dec. 546 and note; *Ufford v. Wilkins*, 33 Iowa, 110; *Sanders v. Godding*, 45 Id. 463; *Wilson v. Hildreth*, 118 Mass. 578; *Opdyke v. Stephens*, 28 N. J. L. (4 Dutch.) 83; *Seaman v. Hogeboom*, 21 Barb. 398; *Drew v. Swift*, 46 N. Y. 204; *Spruill v. Davenport*, Busb. (N. C.) 134; *Coats v. Matthews*, 2 Nott & M. 99; *Bagley v. Morrill*, 46 Vt. 94; *Grand Trunk Railway Co. v. Dyer*, 49 Id. 74. Indeed, courses and distances will, as we have already seen, prevail over calls for monuments where it is necessary to render effectual the manifest intent of the parties to the conveyance, or where the calls for one or more of the monuments were obviously inserted

through mistake or inadvertence: *White v. Luning*, 93 U. S. 515; *Jones v. Burgett*, 46 Tex. 484. See, also, other cases to the same effect, referred to in the last preceding division of this note. A given course and distance will control a call for a supposed line and corner not in fact established at the date of the deed, or which is not marked, certain, and notorious: *Bragg v. Lockhart*, 11 Id. 160; *McCown v. Hill*, 26 Id. 359. Where the courses and distances can not be plotted from the deed, or the survey can not be closed, they do not control inflexibly, but resort may be had to other subordinate parts of the description: *Ratcliffe v. Cary*, 4 Abb. App. 4; *Seaman v. Hogeboom*, 21 Barb. 398.

DISTANCE IS MORE UNCERTAIN than course in determining the location of a boundary, and is the first to yield to a controlling call, and must yield also to the course where both can not be followed in attempting to restore lost lines or corners: *Bryan v. Beckley*, 12 Am. Dec. 276; *Hoffman v. Riehl*, 27 Mo. 554. So where, by violating either and conforming to the other, a peremptory call for an object of length, such as a stream, may be satisfied: *Wilson v. Inloes*, 6 Gill, 121. But it is not an invariable rule that distances yield to courses. Either may be preferred, as may best comport with the manifest intent of the parties and the circumstances of the case: *Loring v. Norton*, 8 Greenl. 61. And the course may yield to the distance, if it is evident from other calls of the deed that the distance is the material and controlling object: *Blight v. Atwell*, 4 J. J. Marsh. 278; *Lincoln v. Elkcomb*, 28 Me. 275. So generally the distance will control in the absence of more certain calls: *Kissam v. Gaylord*, Busb. (N. C.) 116; *Ring v. King*, 4 Dev. & B. L. 164. A mistake in the distance on one line, affects only the corresponding line opposite: *Bryan v. Beckley*, 12 Am. Dec. 276; *Preston's Heirs v. Bowmar*, 2 Bibb, 493.

QUANTITY IS THE LEAST RELIABLE and the last to be resorted to of all the descriptive particulars in a deed: *McClintock v. Rogers*, 11 Ill. 279; *Kruse v. Scripps*, Id. 98; *Phillips' Heirs v. Porter*, 3 Ark. 18; *Petts v. Gaw*, 15 Pa. St. 218. It therefore yields to calls for monuments as well as to the courses and distances, unless there is a clear intent to give only a certain quantity: *Peay v. Briggs*, 12 Am. Dec. 656; *Dale v. Smith*, Id. 64; *Wendell v. Jackson*, 22 Id. 635, per Walworth, Chancellor; *Nichols v. Turney*, 15 Conn. 101; *Chandler v. McCard*, 38 Me. 564; *Campbell v. Johnson*, 44 Mo. 247; *Fuller v. Carr*, 33 N. J. L. (4 Vr.) 157; *Dalton v. Rust*, 22 Tex. 133. So a specification of the quantity will yield to a general description of the land as "being the same lot of land set off and run off" by a designated person: *Clark v. Scammon*, 62 Me. 47. But where the other parts of the description are not sufficiently certain and demonstrative, the quantity becomes essential in determining the identity of the premises, and may have a controlling influence: *Field v. Columbet*, 4 Saw. 523; *McClintock v. Rogers*, 11 Ill. 279; *Pierce v. Faunce*, 37 Me. 63; *Kirkland v. Way*, 3 Rich. (S. C.) 4; *Welder v. Hunt*, 34 Tex. 44.

SURVEY, PLAN, OR PREVIOUS CONVEYANCE REFERRED TO IN DEED.—A survey or plan referred to in the deed becomes a part of it, and is as if it were written in the deed: *Kennebec Purchase v. Tiffany*, 10 Am. Dec. 60; *Lunt v. Holland*, 14 Mass. 419; *Davis v. Rainsford*, 17 Id. 207; *Morse v. Rogers*, 118 Id. 572; *Vance v. Foré*, 24 Cal. 435; *Powers v. Jackson*, 50 Id. 429; *Lincoln v. Wilder*, 29 Me. 169; *Birmingham v. Anderson*, 48 Pa. St. 253. A plat so referred to controls a line subsequently established in surveying another contiguous tract: *Kennebec Purchase v. Tiffany*, 10 Am. Dec. 60. So it controls courses and distances: *Wolfe v. Scarborough*, 2 Ohio St. 361;

Birmingham v. Anderson, 48 Pa. St. 253. So where land is described as the part of a certain survey remaining after a prior conveyance, such residue will pass, although the metes and bounds given in the deed do not include it: *Ragdale v. Robinson*, 48 Tex. 380. So it will control monuments, if that best comports with the manifest intent of the parties, and the circumstances of the case: *Erakine v. Moulton*, 66 Me. 276. A map referred to in the deed will be held to furnish the true description, where one of the boundaries named in the conveyance is a river which is inconsistent with all the other calls, unless such boundary can be shown not to have been inserted by mistake: *Alden v. Pinney*, 12 Fla. 348. A description of a town lot by number makes the town plat a part of the conveyance: *Dolde v. Vodicka*, 49 Mo. 100. So a description of land by numbers of sections makes the plats and field notes of the public surveys a part of the description: *McClintock v. Rogers*, 11 Ill. 279. Where a deed refers to a certain map, and also to the degrees of latitude, the former reference controls: *Mayo v. Maseaux*, 38 Cal. 442. A plat referred to in the deed controls also, though the points of the compass as therein called for are not correct according to the true meridian: *Bower v. Earl*, 18 Mich. 367. Such a plat may also be used to correct mistakes in the calls of a patent, as evidence of the true position of corners, which, when ascertained, must control, though varying from the description in the patent: *Steele v. Taylor*, 13 Am. Dec. 151. But as already shown, the plat being merely a description of the actual survey indicated by the lines run and marked on the ground, is controlled by them: *Williams v. Spaulding*, 29 Me. 112; *Hall v. Davis*, 36 N. H. 569. The fact that a town plat referred to in a deed is unrecorded, does not prevent its being resorted to for the purpose of ascertaining the true location of the land: *Fleischfresser v. Schmidt*, 41 Wis. 223. A prior conveyance referred to in a deed for a description of the premises may be resorted to, and will furnish the description: *Charter v. Graham*, 56 Ill. 19; but it will not control a reference to known monuments: *Morrow v. Willard*, 30 Vt. 118.

DESCRIPTION BY WORDS PREFERRED TO FIGURES.—A description by words is preferred to a description by figures, as where the number of a lot or subdivision of a public survey is both written and expressed in figures: *Montgomery v. Johnson*, 31 Ark. 74; *Bradshaw v. Bradbury*, 64 Mo. 334.

LINE PRESUMED STRAIGHT.—A line described as running between certain points is presumed straight: *Jenks v. Morgan*, 6 Gray, 448; *Henshaw v. Mullens*, 121 Mass. 143; *Kingsland v. Chittenden*, 6 Lana. 15. But the line may be deflected and an angle made to take in a designated monument: *Long v. Long*, 73 N. C. 370; *Clarke v. Wagner*, 76 Id. 463.

WHERE THE BEGINNING POINT IS LOST, but the next corner and the course and distance from the beginning point are known, such beginning point may be found by reversing the first course from the second corner: *Wilson v. Inloes*, 6 Gill, 121; *Dobson v. Finley*, 8 Jones L. 495. So generally a lost corner may be found by reversing the next course if it and the next corner are known: *Coburn v. Coxeter*, 51 N. H. 158; *Safret v. Hartman*, 7 Jones L. 199. The points of intersection of bounding lines will be deemed corners where no marked corners are found: *Thornberry v. Churchill*, 16 Am. Dec. 125.

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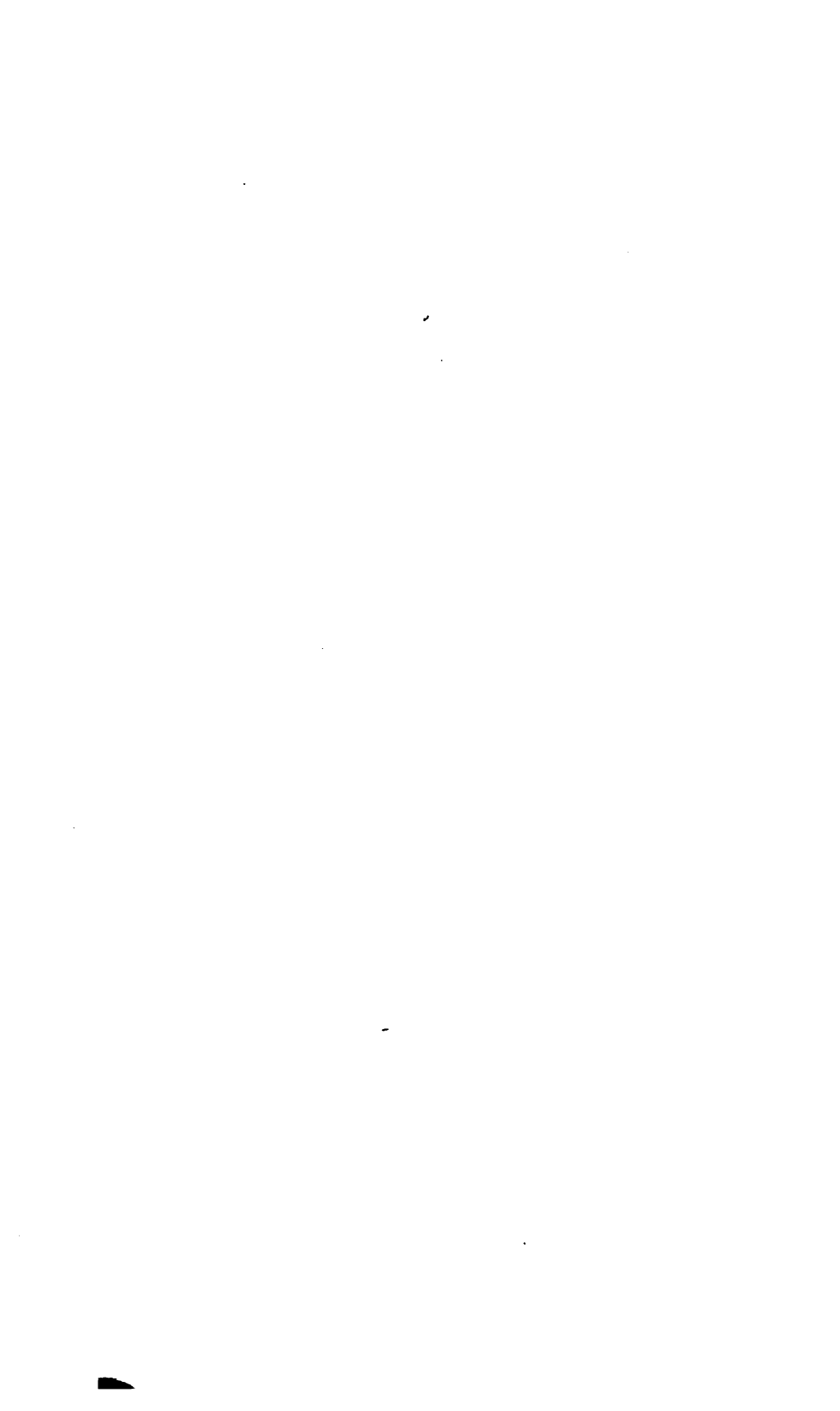
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 2. ACTION FOR MONEY HAD AND RECEIVED is equitable in its nature. *McCrea v. Purmort*, 103.
 3. A SUIT TO AVOID A JUDGMENT recovered by the defendant against her husband, and the assignment of property in pursuance of it, as being in fraud of the plaintiff's right, is a revocatory action within the meaning of the Louisiana code. *Fennessy v. Gonsoulin*, 720.
 4. EVERY DEVICE, CONTRIVANCE, OR MACHINATION by which a creditor may have been prejudiced, may be the subject of such an action. *Id.*
- See CORPORATIONS, 19; ESCAPE, 2, 3; EXECUTORS AND ADMINISTRATORS, 2, 3, 4, 5, 6, 7, 9; NEGOTIABLE INSTRUMENTS, 2.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADULTERY.

See HUSBAND AND WIFE, 1, 2, 3.

ADVERSE POSSESSION.

1. WHAT SUFFICIENT.—The entry of the owner of land is barred only by an actual, continued, visible, notorious, distinct, and hostile possession for twenty-one years, and such owner need not show a possession in himself or those under whom he claims within twenty-one years. *Union Canal Co. v. Young*, 212.
2. IN A CASE OF CONCURRENT POSSESSION, neither party can acquire title against the other by an adverse holding. *Id.*

3. ADVERSE POSSESSION, WHAT NOT EVIDENCE OF.—Where an owner of land has sold part of it for a canal and possession has been taken, such owner, by paying taxes for the whole tract, or leasing the whole of it without excepting such part, or by his tenant raising a crop for a year or two on such part, or by running a fence over it, does not establish such an adverse holding as will ripen into a title. *Id.*
4. QUESTION OF ADVERSE POSSESSION IS ONE OF LAW when the facts are admitted or distinctly proved. *Id.*
5. ADVERSE POSSESSION UNDER UNREGISTERED DEED for seven years protects the party to the extent of the boundaries in the deed. *Jones v. Perry*, 430.
6. POSSESSION OF PART UNDER AN EQUITABLE TITLE, by which the boundary is defined, extends to the whole in the same way as if the title were a legal one. *Id.*
7. WHERE PART OF A TRACT OF LAND IS COVERED BY TWO DEEDS, if the holder of the better title has possession of another part of his tract, but not of that part covered by both deeds, he has, by legal intendment, actual possession of his whole tract, unless the holder of the other title has an actual possession within the intersecting lines. *Carson v. Burnett*, 143.
8. BOTH PARTIES CAN NOT BE SEIZED OF THE SAME LAND at the same time, under their respective deeds; therefore he who has the title is deemed in possession, since he can have no action against the other for any possession by him. *Id.*
9. TRUE OWNER IS PRESUMED BY LAW TO BE IN POSSESSION, unless there be an actual adverse possession in another, of some part of the land of the former; his possession exists in his whole tract until some part thereof be usurped by another, so as to oust him from that part, and there can be no such usurpation but by occupation within the better title. *Id.*
10. POSSESSION OF PART OF A TRACT OF LAND is in law possession of the whole tract, if there is no adverse possession; but if the land consists of different tracts, each particularly described, in the deed to the person in possession, by its several boundaries, according to the original patent for it, an actual possession upon one of such tracts does not in law extend to the other. *Id.*

AGENCY.

1. RATIFICATION OF AGENT'S ACT.—He who is notified that a contract has been made for him and subject to his ratification by a person who pretended to have authority for that purpose is presumed to ratify it, unless immediately on being informed thereof he repudiates it. *Pitts v. Skubert*, 718.
2. CASHIER OF A BANK, in the course of his ordinary duties, and by virtue of the general authority of his office, has the right to transfer the paper securities of the bank in payment of its debts. *Everett v. United States*, 584.
3. WHERE AN INDORSEMENT of such paper is made by a cashier, it will be presumed, in the absence of evidence to the contrary, that it was properly made. *Id.*
4. SUCH PRESUMPTION MAY BE REBUTTED by showing that the indorsement was not made in the regular course of business, but in prejudice of the rights and interests of the bank. *Id.*

5. BANK IS LIABLE FOR OMISSIONS OR MISTAKES OF NOTARY PUBLIC to whom, as its agent, it has intrusted a note left with it for collection. *Thompson v. Bank of South Carolina*, 354.
6. PARTY CONTRACTING WITH AGENT, NOT KNOWING HIM TO BE AGENT, may enforce the contract against the principal upon discovering him. *Episcopal Church v. Wiley*, 386.

See CORPORATIONS, 3, 4; INFANCY, 1.

ALIMONY.

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See INFANCY, 3, 4.

APPROPRIATION.

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See GUARDIAN AND WARD, 1, 2, 6.

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ASSIGNMENTS.

1. DEBTOR MAY LAWFULLY ASSIGN HIS WHOLE ESTATE for the benefit of such of his creditors as will release him. *Niolon v. Douglas*, 368.
2. ASSIGNMENT FOR THE BENEFIT OF CREDITORS CAN NOT RESERVE TO THE ASSIGNOR CONTROL over any part of his assets, in such a manner as to enable him, at his pleasure, to make or withhold payment, according as his creditors shall submit to or reject the terms dictated by him. *Id.*
3. DEBTOR MAY LAWFULLY PREFER one creditor over another. *Id.*

See BONA FIDE PURCHASER, 2.

ATTACHMENT.

1. LIABILITY OF CONSTABLE FOR SEIZING STRANGER'S PROPERTY.—Where, after a constable has levied an attachment on the wagon of a debtor, in possession of a stranger, the latter repossesses himself of the wagon, and, without the constable's knowledge, substitutes cleaves and whiffletrees of his own for those on the wagon, and the constable afterwards retakes the wagon with such cleaves and whiffletrees attached, he is not liable in trespass therefor, but, if at all, only in trover after a demand. *Parker v. Walrod*, 124.
2. PRIOR POSSESSION UNDER A CLAIM OF PROPERTY is sufficient *prima facie* evidence of title in an attachment debtor to cast upon a third person the burden of proof as to ownership, as against an officer seizing the same under an attachment. *Id.*

3. PRODUCTION OF AN ATTACHMENT REGULAR ON ITS FACE from a court having general jurisdiction of the subject-matter, without showing that the requisites of the statute have been complied with in issuing the attachment, is sufficient to protect the attaching officer as against one who does not show a title which would be good against the attachment debtor. *Id.*
4. LEGACY IN THE EXECUTOR'S HANDS IS NOT SUBJECT TO FOREIGN ATTACHMENT for the legatee's debt. *Shewell v. Keen*, 266.
5. A SHERIFF ATTACHING A CHATTEL BECOMES A TRESPASSER *AB INITIO* if he afterwards make use of the chattel instead of simply retaining it in custody. *Lamb v. Day*, 479.
6. A CREDITOR AT WHOSE INSTANCE A CHATTEL IS ATTACHED becomes, together with the attaching officer, a trespasser *ab initio* where there is a subsequent delivery of the chattel to him by the officer, and a subsequent use of the same by him. *Id.*
7. MITIGATION OF DAMAGES IN TRESPASS FOR SEIZURE UNDER VOID ATTACHMENT.—Where an attachment was vitiated by subsequent acts of the creditor and sheriff attaching, they were permitted in trespass for seizure to show that in the attachment suit judgment was finally obtained, and thereupon the property seized under the attachment was sold on execution and the proceeds from the sale applied on the judgment. *Id.*
8. AN OFFICER SEIZING UNDER ATTACHMENT property not that of the defendant, can not be lawfully resisted by the real owner, if he had at the time reasonable cause to believe the property to be that of the defendant in the attachment suit; and did under such belief attempt the seizure in good faith. *State v. Downer*, 482.
9. JUDGMENTS RENDERED IN SUITS BY ATTACHMENT have in North Carolina the same operation and effect as those rendered by the same courts in other actions. *Skinner v. Moore*, 155.
10. JUDGMENT IN ATTACHMENT SUIT HAS, BY THE LAW OF NORTH CAROLINA, THE SAME EFFECT as if the process had been personally served. Such judgment is in fact not *in rem*, but personal. *Id.*
11. DISTRESS OF DEBTOR'S PROPERTY IS INDISPENSABLE IN ATTACHMENT SUITS, in order to constitute the cause in court; and unless that appears from the record, the proceeding is *ex parte*, and not binding upon the debtor. *Id.*
12. EVIDENCE DEHORS THE RECORD IS NOT ADMISSIBLE in such a suit to prove that the estate attached was not the property of the defendant. *Id.*
13. NEGOTIABLE SECURITIES MAY BE ATTACHED as "money due to the defendant" in the attachment. *Id.*
14. DEFECTS IN THE AFFIDAVIT DO NOT RENDER THE JUDGMENT VOID, but are, at most, error only. *Id.*
15. TO ENTER JUDGMENT FOR A LARGER SUM THAN THE DEBT SWORN TO, and named in the attachment, is error for the excess only. *Id.*

See EVIDENCE, 15.

ATTORNEY AND CLIENT.

ATTORNEY PURCHASING FOR ONE OF TWO EXECUTION PLAINTIFFS.—Where an attorney for two plaintiffs in an execution purchases land sold under

the execution at a price less than the amount of the claim, for the benefit of one of the plaintiffs, and takes the deed in his name, without the consent of the other plaintiff, the purchase will be deemed to have been made in trust for both plaintiffs. *Leisenring v. Black*, 322.

AUCTION SALE.

1. AUCTIONEER AT SALE OF LAND is the agent of both parties, and his memorandum in writing is sufficient to take the agreement out of the statute of frauds. *Episcopal Church v. Wiley*, 386; *Smith v. Jones*, 498.
2. AUCTIONEER'S MEMORANDUM, ENTERED IN HIS BOOK AS EARLY AS PRACTICABLE AFTER THE SALE, from a pencil memorandum on a loose slip of paper, made at the moment of the sale, is sufficient, and is to be regarded as the original entry. *Episcopal Church v. Wiley*, 386.
3. AUCTIONEER'S MEMORANDUM MAY BE SPECIFICALLY ENFORCED at the instance of the vendor, although it does not state the credit on which the land was sold. *Smith v. Jones*, 498.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 7.

BAILMENT.

1. BAILEE OF SIMPLE DEPOSIT IS LIABLE, in case of loss of the thing bailed, for gross negligence only, unless, prior to the loss, he violated his implied obligation to return it in a reasonable time; and what is a reasonable time within which he ought, without demand, to return it, is a question of law for the court. *Green v. Hollingsworth*, 680.
2. DEPOSIT MADE AT INSTANCE OF BAILEE requires the observance of ordinary care at least. *Id.*
3. MORE THAN ORDINARY CARE IS REQUIRED BY LAW in case of a simple loan. *Id.*
4. DEGREE OF NEGLIGENCE, in such case, is a question of law for the court; but the facts to establish negligence must be found by the jury. *Id.*
5. DELAY OF THREE WEEKS IN RETURNING WATCH indefinitely loaned for use is not unreasonable. *Id.*
6. BAILEE OF THING LOANED WITHOUT EXPRESS AGREEMENT, IS LIABLE FOR IT, if he fails, upon demand of restitution, to return it or claims it as his own, whatever may happen to it without the lender's agency or assent. *Id.*

BANKS.

See AGENCY, 2, 3, 4, 5; CONSIDERATION.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BONA FIDE PURCHASERS.

1. TO CONSTITUTE A BONA FIDE PURCHASER who will be protected against an equitable or legal title, of which he had no notice, it must be proved, independently of the recital in the deed, that the consideration was paid before receiving notice, and it is not enough to show that it was secured to be paid by mortgage or otherwise. *Union Canal Co. v. Young*, 212.

2. **ASSIGNEE OF PROPERTY TO SECURE DEBT DUE TO HIM, IS NOT A BONA FIDE PURCHASER**, without notice, where he pays no money as a consideration of such assignment. *Harris v. Horner*, 182.

BONDS.

1. **BOND NOT GOOD AS STATUTORY BOND, WHEN.**—A bond taken by a constable before a levy of an execution in his hands, from a stranger, for the payment of the amount of the execution or the delivery of property sufficient to satisfy it, in consideration that he will stay proceedings, where the statute authorizes a bond after levy executed by the debtor with sureties for the delivery of the property levied or payment of the execution, is not good as a statutory bond. *Claassen v. Shaw*, 338.
2. **SUCH BOND IS GOOD** as a common law obligation. *Id.*
3. **AVERMENT THAT SUCH BOND WAS TAKEN FOR EASE AND FAVOR** in a plea to an action thereon is immaterial and need not be traversed. *Id.*
4. **VALIDITY OF AN OFFICIAL BOND** can not be impeached by the officer or his sureties on the ground that it does not conform to the statute where it appears that the bond was more favorable to the obligors than that required by the statute. *Kincannon v. Carroll*, 391.
5. **ALTHOUGH THE CONDITION OF AN OFFICIAL BOND** may not be as extensive as the statute authorizes, yet so far as an obligation is created, it is good. *Id.*
6. **AN OMISSION IN A BOND RENDERING IT INSENSIBLE** may be supplied by reference to the whole bond whereby the intention of the parties can be ascertained. *Id.*

BOOK ENTRIES.

See EVIDENCE, 9, 10, 11, 12, 13, 14.

BOUNDARIES.

1. **CALL FOR THE LINES OF ANOTHER MAY PREVAIL OVER COURSE AND DISTANCES**, when, at the time of the conveyance, such lines were established, known, or reputed to be there; but if the lines were never marked, or there has been no possession according to them, a call for them will be disregarded, and the course and distances must prevail. *Carson v. Burnett*, 143.
2. **SURVEY ACTUALLY MADE GOVERNS THE LOCATION** of land granted with reference to a plan, if such survey can be ascertained. *Heaton v. Hodges*, 731.
3. **LENGTH OF LINE GIVEN ON A PLAN**, exactly measured according to the scale upon which the plan is drawn, is to govern, in such a case, if no survey was made or can be shown, and the lines were not drawn with reference to natural monuments, although it appears that in other parts of the plan a liberal system of measurement was applied. Accordingly, where a line is given in a grant as extending a specified distance to a stone monument which can not be found, and such line so given, or the line given on the plan to which the grant refers, exactly measured according to the scale of the plan, does not include a particular parcel of land, the grantee can not recover such parcel, although by a liberal measurement according to the ratio appearing from other parts of the plan, such parcel would be within the grant. *Id.*

See WATER-COURSES.

CANALS.

See EMINENT DOMAIN, 2; VENDOR AND VENDEE, 2, 3.

CASE, ACTION ON.

See ACTIONS, 1; ESCAPE, 2; MALICIOUS PROSECUTION, 1.

CASH SALE, WHAT IS.

See COMMISSION MERCHANTS, 3.

CASHIER OF BANK.

See AGENCY, 2, 3, 4.

COMMISSION MERCHANTS.

- 1 A COMMISSION MERCHANT INTRUSTED WITH GOODS TO BE SOLD FOR CASH, is responsible for their price, if he sells them on credit. *Bliss v. Arnold*, 467.
- 2 USAGE AMONG COMMISSION MERCHANTS that a sale on a credit of from a week to ten days shall be considered a cash sale, does not affect their customers who have intrusted to them goods for cash sale. *Id.*
- 3 A CASH SALE intends one where the money is paid upon delivery of the property. *Id.*

CONDITIONAL ESTATES.

BY THE COMMON LAW, ESTATES DEFEASIBLE by the payment of money on a particular day were estates upon condition which became absolute by the non-payment. *Hickman v. Cantrell*, 396.

CONDITIONAL SALE.

ON A CONDITIONAL SALE the condition must be strictly performed, and the tender made with all the formalities required by law. *Hickman v. Cantrell*, 396.

See MORTGAGES, 1.

CONFESSIONS.

See EVIDENCE, 20, 21.

CONFLICT OF LAWS.

1. LEX LOCI CONTRACTUS, which in their case is that of payment, regulates the existence of days of grace. *Bryant v. Edson*, 472.
2. THE PLACE OF EXECUTION OF A JOINT PROMISSORY NOTE where the first maker signs in Massachusetts, the second in New Hampshire, will be the former state, where, in addition to the fact of its execution there by the first maker, the note bears date in that state, and it was there that its consideration passed. *Id.*
3. A CONTRACT TO PAY GENERALLY is governed by the law of the place of its execution, though collectible elsewhere. *Id.*
4. THE FORM OF PUBLIC INSTRUMENTS is regulated by the laws of the country in which they are made. *Tickner v. Roberts*, 706.

See INSOLVENCY, 3.

CONSERVATOR OF LUNATIC.

See GUARDIAN AND WARD, 1, 2, 3, 4, 5, 6.

CONSIDERATION.

BENEFIT DERIVED BY A BANK FROM THE USE OF MONEY collected on a note is a sufficient consideration to support its undertaking to collect it. *Thompson v. Bank of S. C.*, 354.

See DEEDS, 8, 9; STATUTE OF FRAUDS, 5, 6.

CONSTABLES.

See ATTACHMENTS, 1; PLEADING AND PRACTICE, 9.

CONSTITUTIONAL LAW.

1. **THE CONSTITUTIONALITY OF A LEGISLATIVE ACT** can not be called in question by the people; individuals alleging themselves to be injured thereby, alone can raise the question. *People v Rensselaer etc. R. R. Co.*, 33.
2. **ARTICLE VII. OF THE AMENDMENTS TO THE NATIONAL CONSTITUTION** establishes a limitation to the mode of trial in the federal courts, but not in the state courts. *State v. Keyes*, 450.
3. **STATUTE DOES NOT IMPAIR OBLIGATION OF CONTRACT, WHEN.**—A statute taking away the preference given to judgments, in the payment of debts owing by a deceased insolvent's estate, by a prior statute, applies to judgments recovered after the passage of the first statute, and before the passage of the second, where the debtor dies after the second statute is enacted, and is not unconstitutional as impairing the obligation of contracts. *Deichman's appeal*, 271.
4. **A SPECIAL ACT AUTHORIZING GUARDIANS TO SELL LANDS OF INFANT WARDS** to pay debts of the latter's ancestor, is judicial in its character and unconstitutional; and this, although the infants may have consented to the passage of the act. *Jones v. Perry*, 430.
5. **THE LEGISLATURE IS NOT SOVEREIGN**; it is not the constituent of the courts, nor are they its agents; and any assumption by the legislature of powers conferred on the judiciary is destitute of authority. *Id.*
6. **THE POWER TO EXERCISE GUARDIANSHIP** over the estates and persons of infants does not exist in the legislature; but it is their duty to provide for and protect infants by general laws. *Id.*
7. **LAW OF THE LAND** means a general and public law, operating equally upon every member of the community. *Id.*

See EMINENT DOMAIN, 3, 4; JUDGMENTS, 4.

CONTINUANCE.

ADMISSION THAT ABSENT WITNESSES, IF PRESENT, WOULD SWEAR TO THE FACTS expected to be proved by them, is not sufficient to defeat a motion for a continuance on the ground of the absence of witnesses; the admission must be of the facts themselves. *Smith v. Creason's Ex'rs*, 688.

CONTRACTS.

1. **INTENTION OF PARTIES TO A CONTRACT GOVERNS** in its construction. *Kendall v. Russell*, 696.
 2. **DELIVERY OF SPECIFIC ARTICLES AT THE TIME AND PLACE** appointed by a contract for their delivery, where the payee does not intend to receive them, nevertheless satisfies the contract. *Case v. Green*, 311.
- See CONSIDERATION; FRAUDULENT REPRESENTATIONS; ILLEGAL CONTRACTS; QUANTUM MERUIT.

CONVERSION.

See TROVER.

CORPORATIONS.

1. **OVERSEERS OF THE POOR ARE A CORPORATE BODY** who may sue and be sued; they may maintain a motion against a predecessor in office for moneys officially received by him and unaccounted for; and they may submit such claim to arbitration. *Chapline v. Overseers*, 504.
2. **WHERE, PENDING SUCH A MOTION, THE PLAINTIFFS' TERM OF OFFICE EXPIRES**, their motion does not abate, but they may proceed and prosecute it, being themselves accountable to their successors for the money recovered. *Id.*
3. **CORPORATION MUST, IN GENERAL, ACT THROUGH ITS COMMON SEAL**, but it may appoint an agent, whose acts, within the scope of his powers, do not require any seal to impart validity to them. *Everett v. United States*, - 584.
4. **APPROVAL BY A CORPORATION** of the acts of one acting as its agent, makes those acts as valid as though authorized in the first instance. *Id.*
5. **IN THE CASE OF AN AGGREGATE CORPORATION, IF A FREEHOLD PASSES TO IT**, it must be a fee or its equivalent, for as such a corporation never dies, a grant which would convey a life estate to an individual, passes to it an estate which is perpetual, or equivalent to a fee simple. *Union Canal Co. v. Young*, 212.
6. **ACT TRANSFERRING EXISTING CORPORATE RIGHTS TO NEW CORPORATION.**—Where, at the request of an association of stockholders in two corporations, an act is passed consolidating them into a single corporation under a new corporate name, abolishing the former corporate names, etc., and providing that the new corporation shall hold and enjoy all the estates, grants, rights, etc., enjoyed by the former corporations, a stockholder in one of the former companies who has granted land to it for the purpose of a canal, but who surrenders his stock and accepts stock in the new company, without objection, thereby acquiesces in the transfer of the corporate rights and property to the new corporation. *Id.*
7. **THERE IS NO SUSPENSION OF CORPORATE RIGHTS** in such a case, the whole estate and interest of the old corporations vesting immediately in the new. *Id.*
8. **WHERE THE ACT OF INCORPORATION OMITTS TO PROVIDE** how private property shall be taken for the purposes of the corporation, it must proceed according to the provisions of the general laws. *Mabire v. Canal Bank*, 710.
9. **SUCH A CORPORATION INCORPORATED TO CONSTRUCT A CANAL** can not, by obstructing natural drains of water, overflow lands adjacent to the line of the canal without making compensation therefor. *Id.*
10. **WHERE THE BY-LAWS OF A CORPORATION REQUIRE ITS PRESIDENT** to keep all bonds of its officers, for his neglect to take a bond from the secretary, he will be liable for the secretary's defalcation to the extent of the bond which ought to have been given. *Pontchartrain R. R. Co. v. Paulding*, 708.
11. **A POWER TO BORROW MONEY IS INCIDENT TO THE OTHER USUAL POWERS OF A MUNICIPAL CORPORATION**, and may be exercised by such a body,

- even though no express grant of the power is found in the charter of the corporation. *President etc. Bank of Chillicothe v. Chillicothe*, 185.
12. **STREETS OF AN INCORPORATED TOWN** are its highways, subject, in general, to such improvement and alterations as its legislative authority may prescribe, due regard being had to individual interests, and an equivalent being rendered for the sacrifice of private property. *State v. Mayor etc. of Mobile*, 564.
 13. **POWERS OF A CORPORATION** are to be ascertained by a reference to grants made by the legislature in its favor. It can have no rights except such as are specially granted, or as are incidental or necessary to give effect to the powers thus granted. *Id.*
 14. **MUNICIPAL CORPORATION** has no authority to appropriate streets or to narrow or widen them, unless vested with such power expressly by its charter, or as an incident to an express delegation of power. *Id.*
 15. **MEMBERS OF SAVINGS INSTITUTION, WHO ARE.**—Under an act incorporating certain persons, and those thereafter becoming members, as a savings institution to receive deposits upon interest, and providing "for the security of the depositors," that the corporators and their associates shall raise a capital of a certain sum to be divided into shares, the holders of which are to receive dividends of the profits, and the capital to be liable for the deposits, and providing also that the directors shall have power to regulate the admission of members, and that there shall be annual meetings of members and a committee of members to investigate the affairs of the corporation, a stockholder does not become a member who is not admitted as such, nor does one originally a member cease membership on parting with his stock. *Philadelphia Sav. Inst., Case of*, 226.
 16. **DIRECTORS CAN NOT DISFRANCHISE MEMBERS OF A CORPORATION** under a clause in the charter giving them power to admit members. *Id.*
 17. **EXPELLED MEMBER OF AN INCORPORATED BENEFICIAL SOCIETY** can not have the regularity of the proceedings or the sufficiency of the evidence for his expulsion inquired into in a collateral action for the recovery of benefits alleged to be due him, such expulsion having been voted after notice, trial, and conviction, agreeably to the provisions of the charter and by-laws, upon a charge thereby made a ground of expulsion. *Black and White Smiths' Soc. v. Vandyke*, 263.
 18. **IRREGULARLY EXPELLED MEMBER MAY HAVE MANDAMUS** to restore him to membership in such a society, it seems. *Id.*
 19. **NO ACTION LIES TO RECOVER BENEFITS** alleged to be due a member of such an organization, even though there has been no sentence of expulsion. *Id.*
 20. **CORPORATOR NOT LIABLE TO USURPERS OF FRANCHISE FOR CORPORATE DUES.**—A member of a religious corporation is not liable for pew rents, where intruders, without authority from the charter or the law, take possession of the church, expel the vestry and choose a new one, although such member retains his pew but refuses to occupy it. *Ebaugh v. Hendel*, 291.
 21. **APPEAL ABATED BY EXPIRATION OF CHARTER, WHEN.**—Where, during the pendency of an appeal from a decree dismissing a bill against a corporation, the charter of the company expires by the lapse of time, the appeal abates. *Rider v. Nelson etc. Factory*, 495.

See QUO WARRANTO; RELIGIOUS SOCIETIES.

COSTS.

See HUSBAND AND WIFE, 4.

CO-TENANCY AND PARTITION.

1. WHERE ONE TENANT IN COMMON holds the common property to the exclusion of his co-tenant, he is not chargeable with rents or profits where none have been made, provided he has employed the property in good faith with a view to make it profitable, but has failed in doing so; nor is he chargeable with speculative profits where the real profits are susceptible of being ascertained. *Ruffners v. Lewis' Ex'rs*, 513.
2. WHERE TENANTS IN COMMON have occupied the common property to the exclusion of a co-tenant, they are entitled, in an accounting for the rents and profits, not only to a credit for their expenses and services actually rendered in operations upon the common property which have made it of great value, but also for expenses, and for labor and services rendered in endeavoring to make it valuable, though unsuccessfully, they having acted *bona fide*, and only with a view of increasing the value of the property. *Id.*
3. WHERE AN ACCOUNTING IS HAD between tenants in common, the expenditures of each year should be offset against the rents and profits of that year, and the claim for improvements in any one year should be liquidated in whole or in part by the rents and profits of that or any succeeding year. *Id.*
4. A TENANT IN COMMON CAN CONVEY HIS INTEREST in a separate part of the tract held in common, and after such conveyance his grantee becomes tenant in common as to that part of the tract. *Prentiss, Matter of*, 203.
5. PARTITION CAN NOT BE HAD IN ONE SUIT OF SEVERAL TRACTS, by a tenant in common of all, where the ownership therein other than his is vested in persons who have between themselves no common interest in the separate tracts; therefore, where a tenant in common, owner of one third of an estate, brought suit to obtain partition, and it appeared that the other two thirds interest had come to several, each of whom was owner of such interest in separate and distinct parts of the estate, his suit was dismissed. *Id.*
6. THERE IS NO IMPLIED WARRANTY IN A PARTITION DEED between tenants in common under a will, though there is, it seems, an implied special warranty annexed to every partition between coparceners. *Weiser v. Weiser*, 313.
7. EXPRESS SPECIAL WARRANTY LIMITS AN IMPLIED GENERAL WARRANTY in a deed, except, perhaps, where the implied warranty is a necessary consequence of tenure, which is not the case in a partition deed. *Id.*
8. PLAINTIFF IN PARTITION MAY BE PERMITTED TO TAKE THE LAND at the valuation, after a judgment by default against non-resident defendants, and the court is not bound to order a sale. *Dewar v. Spence*, 241.

COUNTY COURTS.

See JUDGMENTS, 2.

COVENANTS.

TENANT FOR LIFE CAN NOT SUE UPON A COVENANT OF WARRANTY in a prior deed in fee to one under whom he derails; therefore there is no such

action for a widow, who has been evicted of the lands assigned to her as dower, upon the covenant of warranty to her husband. *St. Clair v. Williams*, 194.

CRIMINAL LAW.

1. WHETHER THE CHARACTER OF AN OFFENSE IS INFAMOUS can not be determined by the mode of punishment affixed to it by law. *State v. Keyes*, 450.
2. ATTEMPT TO DETER A WITNESS from attending the trial of a public prosecution, is an indictable but not an infamous offense; it is an offense also that may be punished by proceedings on information. *Id.*
3. SUCH ATTEMPT, THOUGH MADE BEFORE SERVICE OF A SUBPENA, and though it prove unsuccessful, is nevertheless punishable. *Id.*
4. AN INDICTMENT FOR IMPEDING AN OFFICER in his execution of civil process must show the nature of the process, so far that the court may see whether it was legal, and that the officer had authority to serve it, and the mode of resistance should be set out, as also that in which the process was attempted to be executed, and also it must appear from it that the persons impeding the officer knew of the character in which he acted. *State v. Downer*, 482.
5. ASSAULT OF AND RESISTANCE TO AN OFFICER acting in the execution of his powers as such, is an offense indictable at common law. *Id.*
6. AN OFFENDER MAY BE PROCEEDED AGAINST AS AT COMMON LAW, though a statute has superadded to the offense a higher penalty. *Id.*
7. WAIVER OF TRIAL BY JURY in a criminal case, can only be upon the consent of both the prisoner and the state. *State v. Mead*, 661.
8. TRIAL AND ACQUITTAL OF A CRIMINAL by the court sitting without a jury, is not available under the plea of *autrefois acquit*, upon a second trial for the same offense, where upon the first trial the state had insisted upon a jury. *Id.*

See JEOPARDY; MISNOMER, 2.

DAMAGES.

See ESCAPE, 3; EXECUTIONS, 7; SALES, 4.

DEBT.

See ESCAPE, 2.

DECEASED'S ESTATES.

See ESTATES OF DECEASED PERSONS.

DECLARATIONS.

See EVIDENCE, 16, 17, 18, 19, 20, 21; HUSBAND AND WIFE, 2.

DEEDS.

1. A DEED, SIGNED, ACKNOWLEDGED, AND RECORDED, is a complete and valid deed, although there is no evidence of any formal delivery and the instrument is found among the grantor's papers at his death. *Scrugham v. Wood*, 75.
2. DELIVERY IS ESSENTIAL TO THE VALIDITY OF A DEED; it may be made to the grantee himself or any person authorized to receive it. *Church v. Gilman*, 82.

3. ACCEPTANCE OF DEED ABSOLUTE will be presumed where it is beneficial to the grantee. *Id.*
 4. WHERE A DEED IS DELIVERED BY AN AGENT it should be pleaded as the deed of the principal, not that it was delivered as the deed of the agent. *Id.*
 5. WHERE A WRITTEN CONTRACT HAS A SCROLL annexed thereto, opposite the signature, and the word seal is written in the scroll, but in the body of the instrument there is no recognition of the scroll as a seal, it is a simple contract and not a deed. *Cromwell v. Tate's Ex'r*, 506.
 6. WHERE THE FEE IS CONVEYED BY DEED to be defeated upon the performance of certain conditions, a subsequent deed of the land operates as a contract and conveys only an equitable title. *Ruffners v. Lewis' Ex'rs*, 513.
 7. ENTRY BY TRUE OWNER UPON A TRESPASSER so far reinstates the former in his possession as to render his conveyance, sealed and delivered on the land, valid; but this principle does not apply in a case where the two possessions are clearly of different portions of the land, as distinct parcels. *Carson v. Burnett*, 143.
 8. DEED WHICH WOULD BE VOID, FOR WANT OF CONSIDERATION, at the date of its execution, may be supported by parol proof of subsequent valuable consideration; hence a deed by a husband, to the use of his wife, expressed to be in consideration of love and affection, may, by parol proof, be shown to have been really executed by him in consideration of her renouncing her inheritance in property which he obtained with her, and which he was then about to sell, and such deed will be supported as against his creditors, although he was indebted at the time of its execution. *Banks v. Brown*, 380.
 9. PAROL EVIDENCE TO EXPLAIN CONSIDERATION CLAUSE.—The clause in a deed acknowledging payment of the consideration is not conclusive but *prima facie* evidence, except for the purpose of giving effect to the operative words in the deed, and parol evidence is admissible to show that such consideration, though expressed to have been paid in money, was paid in a different manner, under a special agreement constituting the grantor a trustee of the consideration. *McCrea v. Purnmort*, 103.
 10. STATUTE OF FRAUDS FORBIDDING PAROL AGREEMENTS respecting land does not apply to such a case. *Id.*
- See ADVERSE POSSESSION, 5, 7; BOUNDARIES; COTENANCY AND PARTITION, 6, 7; EQUITY, 3; NOTICE.

DEPOSITIONS.

See EVIDENCE, 6.

DETINUE.

See JUDGMENTS, 6; SALES, 2.

DISTRESS FOR RENT.

BOOKS OF ACCOUNT OF A MERCHANT ARE NOT LIABLE TO SEIZURE as a distress for rent, for they come within the spirit of the law which exempts the utensils of an artisan, or the books of a scholar; and, besides, being mere choses in action, they are not liable to distress for rent. *Davis v. Arledge*, 360.

DIVORCE.

See HUSBAND AND WIFE, 1, 2, 3, 4, 5, 6.

EASEMENTS.

1. GRANT OF A RIGHT OF WAY WILL BE PRESUMED from an uninterrupted enjoyment thereof for twenty-one years. *Worrall v. Rhoads*, 274.
2. SUCH PRESUMPTION APPLIES TO A WAY OVER UNENCLOSED LAND, whether clear or woodland. *Id.*

See EJECTMENT, 2.

EJECTMENT.

1. EJECTMENT CAN NOT BE MAINTAINED by a party in his own name who holds only the equitable or beneficial title to land. *Rufners v. Lewis' Ex'rs*, 513.
2. EJECTMENT FOR AN EASEMENT is not the proper remedy. *Union Canal Co. v. Young*, 212.
3. PLAINTIFF IN EJECTMENT CAN NOT GIVE EVIDENCE OF OTHER TRESPASSES committed by the landlord himself, who makes himself a defendant to protect the possession of his tenant. *Carson v. Burnett*, 143.

EMINENT DOMAIN.

1. A WORK MAY BE OF PUBLIC USE, though conducted and owned by a private corporation. *Willard v. Hamilton*, 195.
2. *IDEM.*—AN EXTENSIVE LINE OF CANAL to be constructed by a private corporation, and which in the act of its incorporation is declared to be a public highway, is a public use. *Id.*
3. A PROVISION IN AN ACT THAT COMPENSATION SHALL FOLLOW, not precede, the taking of private property for public use, is constitutional. *Id.*
4. A PROVISION THAT COMMISSIONERS APPOINTED BY THE LEGISLATURE ASSESS DAMAGES for private property taken for public use, does not infringe the right of trial by jury, guaranteed by the constitution. *Id.*

EQUITY.

1. LEGAL REMEDY DOES NOT BAR EQUITABLE RELIEF, WHEN.—The fact that a party has a remedy at law by an action for money had and received, does not prevent his coming into equity for relief where the money was received by the defendant as trustee for the plaintiff. *McCrea v. Purmort*, 103.
2. JUDGMENT AT LAW—RELIEF AGAINST IN EQUITY.—Where, in a proceeding by one person against another to recover money which he alleged to have paid as the surety for the latter, it was determined that both were principals, and judgment was rendered in favor of the plaintiff for a moiety of the sum paid, the defendant, having made no defense, can not come into equity and obtain any relief, although he shows that he was the surety, and the plaintiff in the action at law the principal, unless he alleges and proves sufficient reasons for his failure to defend at law. *Turner v. Davis*, 502.
3. TO ORDER THE CANCELLATION OF A VOID DEED, equity has jurisdiction. *Jones v. Perry*, 430.

4. **EQUITY WILL NOT ENFORCE** an equitable title purchased by a party, which if the legal title, would subject him to the penalties of the statute against buying and selling a pretended title. *Ruffners v. Lewis' Ex'rs*, 513.
 5. **THIS PRINCIPLE DOES NOT APPLY** to every purchaser of equitable rights, as where a creditor purchases his debtor's property to protect himself. *Id.*
- See **GUARDIAN AND WARD**, 7; **MERGER**; **NUISANCE**, 4, 5, 6, 7; **SPECIFIC PERFORMANCE**; **STATUTE OF LIMITATIONS**, 1.

ERROR.

See **WRIT OF ERROR**.

ESCAPE.

1. **JAILER IS LIABLE TO THE SHERIFF FOR PERMITTING AN ESCAPE** without the sheriff's knowledge or authority, for any damage occasioned to the sheriff thereby, even though the jailer acts in good faith and upon the advice of counsel. *Duncan v. Klinefelter*, 295.
2. **DEBT OR CASE FOR AN ESCAPE, DAMAGES IN.**—In debt for an escape of an execution debtor, the sheriff is liable for the whole debt and costs, but in case, the damages are in the discretion of the jury. *Id.*
3. **MEASURE OF DAMAGES IN ACTION AGAINST JAILER FOR ESCAPE.**—The amount paid by a sheriff to compromise an action brought against him for the escape of an execution debtor is not the measure of his damages against the jailer, who permitted the escape, but the damages must be left to a jury. *Id.*

ESTATES OF DECEASED PERSONS.

COURT WILL DIRECT PROFITS OF TESTATOR'S ESTATE to be applied to the support of his children, although the will provide that they should be lent out until the youngest child attains his majority, and then divided among them. *Maupin v. Dulany*, 699.

See **EXECUTORS AND ADMINISTRATORS**.

EVIDENCE.

1. **COMPETENCY OF WITNESS IS NOT AFFECTED** by mere solicitude for the success of one of the parties, arising from friendship, honorary obligation, or voluntary intention to divide the burden of a failure in the suit, or from a hope of participating in the advantages of success. *Elliot v. Porter*, 689.
2. **INTEREST, TO DISQUALIFY WITNESS, MUST BE A LEGAL INTEREST** in the event of the suit. *Id.*
3. **PERSONS WHO HAVE RELEASED THEIR INTEREST**, or removed from the neighborhood, are competent witnesses to prove an agreement by parol by an owner of land, to give land enough for a school, if the neighbors will build a school-house, where the house has been built accordingly. *Martin v. McCord*, 342.
4. **MINUTES OF TESTIMONY OF DECEASED WITNESS** taken at a former trial by one who states that he tried to take down all the witness said, not the substance, but the precise words, is admissible although the party will not swear that he had taken down every word. *Clark v. Vorce*, 53.

5. ON RE-EXAMINATION OF A WITNESS after cross-examination, he may be examined, in the discretion of the judge, upon new matters. *Id.*
6. A DEPOSITION ALTERED IN A MATERIAL PART by the magistrate before whom it was taken, the party deposing not being present at the time, is inadmissible, nor can it be aided by parol proof as to the manner in which it appeared before the alteration. *Winooskie Turnpike Co. v. Ridley*, 476.
7. REFUSAL TO DENY A FACT BY AN EXTRAJUDICIAL OATH is not legal evidence of the fact against the party refusing the oath, and it is error to admit testimony of either the taking or refusing of such oath. *Mattos v. Bays*, 694.
8. OBJECTION TO DEFENDANT'S TESTIMONY will not be sustained where the complainants have made him a witness by seeking a discovery. *Jones v. Perry*, 430.
9. BOOK ENTRIES MADE, WHEN NO RIGHT TO MAKE THEM EXISTED at the time, are not admissible in evidence, as where work was done under a special contract and entries thereof in the plaintiff's books were sought to be used as evidence on a *quantum meruit*. *Merrill v. Ithaca etc. Co.*, 130.
10. ORIGINAL ENTRIES MADE IN THE USUAL COURSE of business are not admissible unless the person who made them is produced, or is shown to be dead. *Id.*
11. ENTRIES MADE BY ONE WHO IS LIVING AND PRESENT to verify them by swearing that he believes them to be true, are admissible in evidence, though the party making them has forgotten the facts. *Id.*
12. CHECK-ROLLS KEPT BY A CONTRACTOR WITH HIS WORKMEN are not evidence of the amount of work done, against the railroad company for whom it was done, unless verified by the oath of the person who made the entries therein, if he be living. *Id.*
13. ENTRIES BY A BLACKSMITH ON A SLATE, and transferred to a book four or five days afterwards, are not admissible in evidence as original entries in such book, though such be the custom among blacksmiths. *Forsythe v. Norcross*, 334.
14. SHINGLE UPON WHICH A WOODMAN KEPT AN ACCOUNT of the quantity of timber hewn by him in the woods from day to day under a contract with another who took away the timber without a survey, is admissible evidence in an action brought by such woodman's administrator against the employer to recover the value of such labor. *Kendall v. Field*, 723.
15. WITNESS IS DISQUALIFIED BY INTEREST FROM TESTIFYING in favor of the defendant in an attachment suit, where the land attached has subsequently been conveyed to such witness with warranty, and by him conveyed to another with warranty. *Id.*
16. ACTS AND DECLARATIONS BY ONE IN POSSESSION OF LAND as owner, respecting the dividing line between himself and an adjoining proprietor, which are adverse to his interest, are admissible in evidence in an action of trespass against parties entering under and identified in interest with him, although he is alive and competent to testify. *Deming v. Carrington*, 591.
17. DECLARATIONS ACCOMPANYING AN ACT are admissible as part of the *res geste*. *Id.*
18. DECLARATIONS OF A JUDGMENT DEBTOR after a sale of property under ex

cution against him, that the title of the property at the time of the sale was not in him, are inadmissible in evidence against the execution purchaser. *Doe ex dem. Maxwell v. Moore*, 666.

19. ON A TRIAL FOR MURDER, evidence that the deceased, the day before he was killed, stated that he was going on a certain trip, and that the defendant was to accompany him, is inadmissible. *Kirby v. State*, 420.
 20. ON AN EXAMINATION AS TO THE CONFESSION of a party, the whole confession must be taken together. *Mumford v. Whitney*, 60.
 21. *IDEM.*—BUT A PARTY CAN NOT DRAW OUT HIS OWN DECLARATIONS upon a subject on which the opposite party has not examined the witness. *Id.*
 22. COPY OF AN UNEXECUTED DRAFT of an agreement is not admissible in evidence. *Id.*
 23. A WITNESS, OFFERED TO PROVE A LICENSE, may be asked whether or not it was understood by the parties that it was conditional. *Id.*
- See ATTACHMENT, 2, 3, 12; DEEDS, 9; EJECTMENT, 3; FORCIBLE ENTRY AND DETAINER, 3; GUARDIAN AND WARD, 5; HUSBAND AND WIFE, 1, 2; MORTGAGES, 7; USAGE, 3, 4, 8, 9, 11.

EXECUTIONS.

1. EXECUTION ISSUED ON A JUDGMENT PAID, BUT NOT RELEASED OF RECORD, where such issue has been obtained by third parties, without the concurrence of the judgment creditors, will render those parties liable in trespass for the acts done under the process. *Pierson v. Gale*, 487.
2. MISTAKE IN THE NAME OF THE PLACE OF IMPRISONMENT will not vitiate an execution issued in a civil case, and so prevent it from justifying an imprisonment at the place that should have been named in the writ. *Lewis v. Avery*, 469.
3. IMPRISONMENT UNDER SEVERAL EXECUTIONS, SOME OF WHICH ARE VOID, is justified if any one of the executions standing alone would have justified it. *Id.*
4. IT IS A TRESPASS FOR A SHERIFF TO LEVY ON ANOTHER'S PROPERTY, taking a receipt and inventory to prevent its removal. *Fonda v. Van Horne*, 77.
5. REDEMPTION OF LANDS SOLD UNDER EXECUTION may be made by the trustees of an absent debtor; but, by such redemption, the trustees acquire no greater rights or powers than the defendant himself would have, had he redeemed. *Phyfe v. Riley*, 55.
6. A STRANGER IS NOT ENTITLED TO REDEEM; but should the purchaser at the execution sale permit it, he would be considered as acting on behalf of the execution defendant. *Id.*
7. DAMAGES FOR REFUSING AND NEGLECTING TO LEVY.—The rule of damages in an action against a sheriff for neglecting and refusing to levy or return an execution, is the amount for which the execution was levied, and the measure of recovery can not be diminished by proof that the circumstances of the execution debtor were such that the execution would have answered nothing if levied. *Hall v. Brooks*, 485.

See ATTORNEY AND CLIENT; BONDS, 1.

EXECUTORS AND ADMINISTRATORS.

1. PERSONAL REPRESENTATIVE of a testator or intestate has no interest in the real estate of the deceased, and no power to sell it, unless authorized

- to do so by an order of the proper court made in exercise of the jurisdiction conferred by statute. *White, Adm'r, v. Beard*, 552.
2. RIGHT OF SUCH REPRESENTATIVE TO RECOVER the purchase money agreed to be paid the deceased for the conveyance of a tract of land, where there has been a part performance by the delivery of possession, is founded upon the agreement which shows that the deceased intended to convert his interest in the land into personal property, and also because, there having been a part performance and no subsequent default, a specific execution of the agreement may be had. *Id.*
 3. ADMINISTRATOR WHO HAS AGREED BY PAROL TO CONVEY to another a tract of land when the purchase money is all paid, may sue and recover any installment thereof that may be due, without having made or tendered a conveyance of the title, the vendee being in possession. *Id.*
 4. WHERE A. SOLD LAND BY PAROL, and the vendee went into possession, and, after the vendor's death, executed his note to the administrator of the vendor for the purchase price, and took the administrator's bond for title, conditioned for the making of title when the note was paid, in an action by B., administrator *de bonis non* of A., to recover the amount of the note: *Held*, 1. That the vendee's possession having been undisturbed, the note given by him was founded upon a sufficient consideration, and might be enforced. 2. That the administrator *de bonis non* was the proper party to sue the vendee. *Id.*
 5. AT COMMON LAW NO ACTION COULD BE MAINTAINED BY AN EXECUTOR OR administrator to recover damages for an injury done either to the person or property of his testator or intestate. *Blakeney v. Blakeney*, 574.
 6. STATUTE 4 EDWARD III., c. 7, AUTHORIZES an executor to maintain trespass for an injury to the goods and chattels of a testator; and by 25 Edward III., c. 5, this remedy was extended to executors of executors; and by 31 Edward III., c. 11, to administrators. *Id.*
 7. EXECUTOR MAY SUE, WHEN.—Where, in an action for the recovery of a certain interest in a tract of land, for a partition and for an accounting of the rents and profits, one of the plaintiffs died after a decree had been entered ascertaining their rights, partitioning the land, and directing a conveyance to be made, the action may be revived in the name of the deceased plaintiff's executors, and not in the name of his heirs, the former being entitled to the rents and profits. *Ruffners v. Lewis' Ex'rs*, 513.
 8. PURCHASE MONEY AGREED TO BE PAID by a party to a contract for the sale of land, is treated in equity as the personal property of the vendor, and as such goes to his personal representative. *Hays v. Hall*, 530.
 9. SUCH REPRESENTATIVE HAS ALL THE REMEDIES to recover or retain such purchase money as the vendor would have if living, and in an action to recover the same he must make the heirs of the vendor as well as the vendee, and all other persons who have an interest in the matter, parties to his bill. *Id.*
 10. SUBROGATION OF PURCHASER FROM EXECUTOR TO RIGHTS OF CREDITORS OF TESTATOR.—Where an executor, under a mistake as to his power, sells lands of his testator, and applies the proceeds to the payment of debts, the purchaser will be subrogated to the rights of those creditors who have been paid by his advances, to the extent that the debts exceeded the amount of the personal assets. *Scott v. Dunn*, 174.

See ATTACHMENT, 4; FIXTURES; GUARDIAN AND WARD, 10.

EXEMPTIONS.

See DISTRESS FOR RENT.

FEMES-COVERT.

See MARRIED WOMEN.

FIXTURES.

RUNNING GEAR OF A COTTON-GIN IS A **FIXTURE**, attached to the freehold, which the administrator has no right to sell. *McKenra v. Hammond*, 366.

FORCIBLE ENTRY AND DETAINER.

1. IN AN ACTION OF FORCIBLE ENTRY AND DETAINER, the title is not to be inquired into. *Davidson v. Phillips*, 393.
2. ONE HAVING TITLE CAN NOT ENTER AND DISPOSSESS BY VIOLENCE one having no title whatever. *Id.*
3. IT IS SUFFICIENT EVIDENCE OF POSSESSION to lock the doors of the house, close the windows, and drive cattle on to the premises. *Id.*
4. ONE WHO ENTERS UPON PREMISES SO POSSESSED will be presumed to have done so forcibly, there being no other way in which entrance to the house could be obtained, those in possession having refused to give up the keys thereto. *Id.*

FRAUDULENT CONVEYANCES AND TRANSFERS.

1. VOLUNTARY CONVEYANCE IN PENNSYLVANIA is not void by the statute of 27 Elizabeth, if not actually fraudulent. *Dougherty v. Bell*, 335.
2. TRANSFER OF CHATTELS, UNACCOMPANIED BY A CHANGE OF POSSESSION, is void as against creditors. *Streeper v. Eckart*, 255.
3. TRANSFER OF CHATTELS BY A DEBTOR A FEW DAYS AFTER A JUDGMENT has been recovered against him, even though it be for value, and accompanied by a change of possession, affords suspicion of an intent to defeat the judgment creditor's claim, and the transferee is bound to remove all doubts of the fairness of the transaction in a contest with such creditor. *Id.*
4. TEMPORARY CHANGE OF POSSESSION upon a sale of personal property, followed by an immediate return of possession to the vendor, will not protect the property as against the latter's attaching creditors. *Morris v. Hyde*, 475.
5. POSSESSION REDELIVERED TO THE VENDOR BY THE AGENT OF THE VENDOR, in whose possession the property is, though unauthorized, will, if made in close proximity to the sale, let in the vendor's subsequent attaching creditors. *Id.*

See ACTIONS, 3, 4; MARRIAGE SETTLEMENTS, 3.

FRAUDULENT JUDGMENTS.

See ACTIONS, 3, 4.

FRAUDULENT REPRESENTATIONS.

REPRESENTATIONS ADDRESSED TO THE SUPERSTITIOUS FEARS of a party to induce him to enter into a contract, to the effect that if he does so, his name will be "written in the Lamb's book of life;" and that if he does

not, he will "go to hell," if conscientiously and sincerely made, do not furnish ground for setting aside the contract, but direct imposition must be shown. *Schriber v. Rapp*, 327.

FREIGHT.

See SHIPPING, 2, 3, 4.

GIFTS.

1. A GIFT OF A SLAVE TO ONE "for and during, and until the full end and term of her natural life; and after the determination of that estate, then to the heirs of the body" of the donee, vests the entire interest in the donee. *Polk v. Faris*, 400.
2. WHERE WORDS WOULD RAISE AN ESTATE TAIL IN REALTY, they will give the absolute property in realty. *Id.*

See STATUTE OF FRAUDS, 3.

GRANTS.

See DEEDS; PATENTS—LAND.

GUARANTY.

See NEGOTIABLE INSTRUMENTS, 17.

GUARDIAN AD LITEM.

See PROCHEIN AMI, 1.

GUARDIAN AND WARD.

1. CONSERVATOR OF A LUNATIC MAY SUBMIT TO ARBITRATION a claim of his ward against a third person. *Hutchins v. Johnson*, 622.
2. CONSERVATOR SUING ON THE AWARD in such a case must show that he was legally appointed. *Id.*
3. NOTICE OF THE APPLICATION for the appointment of a conservator pursuant to statute is indispensable to the validity of the appointment, and that such notice was duly given to the ward, must appear by the record to have been found by the court. *Id.*
4. RETURN OF SERVICE OF NOTICE in the files brought up with the record, is, in the absence of a finding of notice in the record, insufficient to render the appointment of a conservator valid. *Id.*
5. OFFICER'S RETURN IS ONLY PRIMA FACIE EVIDENCE of the fact certified. *Id.*
6. CONSERVATOR CAN NOT SUE IN HIS OWN NAME on an award in his favor as conservator pursuant to a submission by him as such conservator. *Id.*
7. COURT OF EQUITY WILL SANCTION SUCH USE OF WARD'S FUNDS by his testamentary guardian, as it would have authorized him to make, had a special application been previously made. *Maupin's Ex'r v. Dulany's Devises*, 699.
8. TESTAMENTARY GUARDIAN SHOULD NOT BE CHARGED WITH COMPOUND ANNUAL INTEREST on rents of land received by him; he is not, like statutory guardians, required to settle annually with the county court, but is a trustee, and not chargeable with more interest than he actually received, or than a faithful and prudent fiduciary ought to have received. *Id.*

9. GUARDIAN SHOULD BE ALLOWED FOR CLOTHING HIS WARDS, although he made no regular charge for it; and also for their board, where, although old enough to earn their own board, it is shown that they were, for a great portion of the time, at school. *Id.*
10. EXECUTOR OF TESTAMENTARY GUARDIAN can not be allowed anything for personal services rendered by such guardian to his wards, where the guardian made no charge for such services; actual expenses, and compensation for their board and clothing only, can be allowed. *Id.*
11. SETTLEMENTS MADE BY TESTAMENTARY GUARDIAN WITH COUNTY COURT are *prima facie* evidence in a suit in equity, where the guardian was requested, by the will, to make such settlements. *Id.*

See CONSTITUTIONAL LAW, 4, 6; PARENT AND CHILD, 7, 8, 9.

HUSBAND AND WIFE.

1. ADULTERY NEED NOT BE PROVED BY DIRECT TESTIMONY, but it may be inferred from circumstances that lead to it by fair inferences, as a necessary conclusion. *Richardson v. Richardson*, 538.
2. ADMISSION OR CONFESSION of a defendant in his answer can not establish adultery or authorize a decree of divorce upon that ground, either in cases of divorce *a vinculo* or *a mensa et thoro*. *Id.*
3. DESERTION ON THE PART OF PLAINTIFF IS NO DEFENSE to an action of divorce upon the ground of adultery. *Id.*
4. COSTS WILL NOT BE AWARDED against a wife in a divorce suit brought by her although she is unsuccessful. *Id.*
5. COURT OF EQUITY, ON A BILL FOR DIVORCE by the wife, will direct the husband to pay over to a *prochein ami* sufficient funds to prosecute the suit to a final hearing. *Id.*
6. ALIMONY WILL ALSO BE AWARDED the wife *pendente lite*. *Id.*
7. AN ASSIGNMENT PURSUANT TO A JUDGMENT in favor of a wife for her dotal and paraphernal rights, is but a contract, and may be attacked by the husband's creditors for fraud. *Fennessy v. Gonsoulin*, 720.
8. MERE ACKNOWLEDGMENT IN A MARRIAGE CONTRACT of the receipt of money, is not conclusive on the husband's creditors. *Id.*

See ACTIONS, 3; MARRIAGE SETTLEMENTS; MARRIED WOMEN.

ILLEGAL CONTRACTS.

LAW WILL NOT AID EITHER OF THE PARTIES TO AN ILLEGAL CONTRACT, when both are equally in fault. *Green v. Hollingsworth*, 680.

See INDEMNITY.

IMPEDING EXECUTION OF PROCESS

See CRIMINAL LAW, 4, 5.

IMPROVEMENTS.

IMPROVEMENTS ERRECTED BONA FIDE may be set off against the value of the rents and profits, where the defendants entered under a deed void in fact, but which they thought to be valid. *Jones v. Perry*, 430.

INDEMNITY.

PROMISE TO INDEMNIFY AGAINST THE DOING OF AN ACT IS VOID, WHEN the
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act was, at the time, known to be a trespass, but if it was not known to be illegal, the promise to indemnify is valid. *Davis v. Atridge*, 300.

See SURETYSHIP, 9.

INDICTMENT.

See MISNOMER, 2.

INFAMOUS CRIME.

See CRIMINAL LAW, 1, 2.

INFANCY.

1. AN INFANT CAN NOT APPOINT AN AGENT for the sale of her property. *Fonda v. Van Horne*, 77.
2. AN INFANT'S SALE OR GIFT OF PERSONALTY, accompanied by a delivery by his own hand, is voidable only. *Id.*
3. WHERE AN INFANT'S FATHER exchanged property of the infant, with his consent, for other property which was seized under execution as belonging to the father, the infant's remedy is not in replevin against the creditor. The act of the father was void, and the infant can pursue his original property. *Id.*
4. ARTICLES OF APPRENTICESHIP are not binding upon a minor, unless approved by either a parent or guardian. *Harney v. Owen*, 662.
5. RESCISSION BY A MINOR of a fair and equitable contract into which he had entered, will prevent him from recovering the value of the services performed under the contract prior to its rescission. *Id.*

See PARENT AND CHILD.

INSOLVENCY.

1. UNDER THE STATUTES OF VIRGINIA, upon the taking of the insolvent debtor's oath, the land of the insolvent vests in the sheriff of the county where the land lies, without any deed from the insolvent; and a deed from him attempting to convey it to the sheriff of another county is inoperative. *Ruffners v. Lewis' Ex'rs*, 513.
2. WHERE A SUIT IS BROUGHT BY A PERSON WHO HAS TAKEN THE INSOLVENT DEBTOR'S OATH, and certain of his creditors, seeking a recovery of an undivided interest in certain land in the adverse possession of certain of the defendants, a partition against a co-owner, and an accounting for the rents and profits, the sheriff in whom the legal title to the land is vested should be made a party; but if he is dead, and the necessity of making his heirs parties is waived, this is a sufficient excuse for not bringing them before the court. *Id.*
3. STATE INSOLVENT LAW DOES NOT APPLY TO UNITED STATES COURTS.—A discharge by a state judge of a debtor imprisoned on process from a United States court, under the insolvent laws of the state, is invalid, because the state laws do not apply *proprio vigore* to the United States courts, and no such power is given to a state judge by the act conforming the proceedings of the United States courts to those of the state courts. *Duncan v. Klinefelter*, 295.

See ASSIGNMENTS; PAYMENT

INSURANCE—MARINE.

1. **INSURED VESSEL SPRINGING A LEAK** a day or two after sailing, without any storm or other visible adequate cause, is to be presumed unseaworthy so as to exonerate the insurers from liability for repairs, even though she ultimately reaches her port of destination. *Prescott v. Union Ins. Co.*, 207.
2. **INSTRUCTION THAT THE LAW PRESUMES UNSEAWORTHINESS** in such a case, if the jury find the fact to be as stated in the protest, that the vessel began to leak as soon as she sailed, and the leak continued and was increasing when a storm arose, so that she would have required repairs if there had been no storm, no contradictory evidence appearing, is not erroneous. *Id.*
3. **TO LEAVE IT TO THE JURY** to presume facts without evidence to support such presumption is error. *Id.*
4. **NO RECOVERY FOR LOSS OF GOODS SHIPPED ON DECK** can be had where the application for the insurance did not state that they were so shipped, and the insurers had no knowledge of that fact, although in the bill of lading which was given to the secretary of the company, the fact was stated, it appearing that the secretary did not open or read the bill of lading. *Smith v. Mississippi etc. Ins. Co.*, 714.

INSURANCE—FIRE.

1. **DESCRIPTION OF A HOUSE AS "MY HOUSE,"** in an application for insurance, is not erroneous so as to vitiate the policy, where the applicant is in possession under a valid contract to purchase and has paid part of the consideration, but has received no conveyance. *Aetna Fire Ins. Co. v. Tyler*, 90.
2. **PURCHASER IN POSSESSION IN SUCH A CASE HAS AN INSURABLE INTEREST** to the full value of the house, and may recover such value within the amount insured, upon a total loss, notwithstanding a previous policy taken out by his vendor upon the same property. *Id.*
3. **TO CONSTITUTE DOUBLE INSURANCE,** both policies must be upon the same insurable interest, either in the name of the owner thereof, or of some one for his benefit. *Id.*
4. **POLICY OF FIRE INSURANCE IS A PERSONAL CONTRACT** with the assured, and does not pass to a purchaser of the property unless assigned with the assent of the insurer. *Id.*
5. **POLICY ISSUED TO A VENDOR OF PROPERTY BEFORE THE SALE,** and not assigned to the purchaser, protects his insurable interest to the extent of the unpaid purchase money, but does not affect the purchaser's liability for such unpaid balance. *Id.*
6. **INSURANCE SO EFFECTED BY THE VENDOR IS NOT A "PREVIOUS" or "other insurance"** within the meaning of conditions in a subsequent policy to the vendee, that it shall be forfeited by a failure to notify the company of any "previous insurances," and that in case of "any other insurance" upon the property, the respective insurers are to contribute ratably in case of a loss, where such prior policy is not assigned to the purchaser. *Id.*
7. **FORMAL DEFECTS IN PRELIMINARY PROOFS** of a loss on a policy, which might have been obviated if objected to in season, will be deemed

- waived if the insurers do not object to paying the loss on that ground, but on another distinct ground. *Id.*
8. **MAGISTRATE'S CERTIFICATE OF A LOSS** required by a policy need not be in the precise words of the policy. *Id.*
 9. **CERTIFICATE STATING THAT THE MAGISTRATE IS "ACQUAINTED"** with the assured and resides within two miles of him, is sufficient to comply with a requirement in the policy that the magistrate shall state that he is "acquainted with the character and circumstances" of the assured. *Id.*
 10. **STATEMENT OF LOSS IN THE CERTIFICATE** to the effect that the magistrate is satisfied that the assured has "sustained damage or loss by said fire to the amount of the buildings" mentioned in the assured's affidavit of loss, is sufficient to fulfill the requirement that the amount of the loss shall be stated. *Walworth, Chancellor, contra. Id.*
 11. **WARRANTY IN AN INSURANCE POLICY**, either express or implied, is in the nature of a condition precedent to a recovery, and avoids the contract if not strictly complied with. *Farmers' Ins. etc. Co. v. Snyder*, 118.
 12. **MISREPRESENTATION MUST BE MATERIAL TO THE RISK**, in order to avoid a policy, but if material to the risk it will have that effect, whether it is made designedly or by mistake. *Id.*
 13. **REPRESENTATION NEED NOT BE LITERALLY ACCURATE**, even as to a matter material; substantial correctness is enough. *Id.*
 14. **JURY IS TO DECIDE WHETHER A MISDESCRIPTION** of the property in the survey was fraudulent, or materially affected the risk. *Id.*
 15. **MISDESCRIPTION OF A BUILDING, BY A MISTAKE** of the surveyor, in stating that a stone partition running through the building extended to the level of the roof, when in fact it was several feet below that level, will not avoid a policy on a stock of goods described as contained in such building, where the risk is not shown to have been materially increased. *Id.*
 16. **REFERENCE IN A FIRE POLICY TO THE APPLICATION AND SURVEY** as containing a particular description of the property does not constitute such description a warranty, but a representation only, unless there is something in the policy to show that it is the intention to make the description a warranty. *Id.*

INTEREST.

See *GUARDIAN AND WARD*, 8; *SURETYSHIP*, 5.

JAILERS.

See *ESCAPE*, 1.

JEOFAILS.

ACT OF 1806 CURES ALL MATTERS OF FORM in actions real, personal, and mixed. *Dewar v. Spence*, 241.

JEOPARDY.

IT WILL BE PUTTING A MAN IN JEOPARDY when, having been found guilty on one of three counts, he moved for a new trial, and is put again on trial on all three counts; and if on such second trial he is acquitted on the count upon which he was before found guilty, he will be entitled to be discharged. *Campbell v. State*, 417.

JUDGMENTS.

1. JUDGMENT OF COURT HAVING JURISDICTION OF THE SUBJECT-MATTER, and proceeding according to the course of the common law, is conclusive until set aside or reversed, and can not be impeached collaterally. *Skinner v. Moore*, 155.
2. COUNTY COURTS ARE, IN THIS STATE, COURTS OF GENERAL JURISDICTION, and their judgments are entitled to the faith and credit of record evidence, when the cause of action is within their jurisdiction, and the person or thing necessary to constitute a cause in court is found and taken within the county. *Id.*
3. JUDGMENT CAN NEVER BE VOID WHERE THE COURT HAS JURISDICTION over the suit, and the right to determine whether the demand on which it was rendered was legal and enforceable or not. *Arnold v. Shields*, 669.
4. JUDGMENT OF JUSTICE'S COURT FOR A PENALTY, in a sum within its jurisdiction, imposed by an unconstitutional statute, is not void, but merely erroneous, and may be corrected by an appeal to the circuit court; in such a case the magistrate has a right to adjudicate and to decide whether the statute under which such penalty is claimed is valid or void. *Id.*
5. CIRCUIT COURT, IN SUCH A CASE, CAN NOT INTERPOSE by writ of prohibition, but can relieve the complaining party by appeal only. *Id.*
6. JUDGMENT IN DETINUE MERGES ALL RIGHT OF ACTION by the same plaintiff against the same defendant for the same cause of action; but such judgment does not extinguish any cause of action that such plaintiff may have against another person for the detention or conversion of, or trespass upon the same property. *Elliot v. Porter*, 689.
7. MERE UNSATISFIED JUDGMENT AGAINST ONE OF SEVERAL, FOR DETENTION OF PROPERTY, is no bar to a suit against another guilty of the same or a different detention of the same thing. *Id.*

See ACTIONS, 3, 4; ATTACHMENT, 9, 10, 14, 15; CONSTITUTIONAL LAW, 3; EQUITY, 2.

JURISDICTION.

CIRCUIT COURTS, IN THIS STATE, POSSESS GENERAL SUPERINTENDENCE over all subordinate courts, to keep them within their prescribed spheres, and to prevent usurpation. *Arnold v. Shields*, 669.

See JUDGMENTS, 2, 3; NUISANCE, 4, 5, 6, 7.

LANDLORD AND TENANT.

WHERE LAND IS LEASED for a certain and determinate period, the tenant is not entitled to the crop on the land at the end of the term. *Harris v. Pearson*, 510.

See DISTRESS FOR RENT.

LAW OF THE LAND.

See CONSTITUTIONAL LAW, 7.

LEGACY.

See ATTACHMENT, 4.

LEGISLATURE, POWERS OF.

See CONSTITUTIONAL LAW, 5.

LEX LOCI CONTRACTUS.

See CONFLICT OF LAWS.

LICENSE.

1. A LICENSE IS AN AUTHORITY TO DO A PARTICULAR ACT upon another's land; is founded in personal confidence, and is not assignable; it gives no interest in the land, and may rest in parol. *Mumford v. Whitney*, 60.
2. *IDEM.*—But a permission to erect and maintain a dam on another's land so long as there shall be employment for the water power, can not be given by parol, but must be in writing. *Id.*

See TRESPASS, 2.

LOST NOTES.

RECOVERY MAY BE HAD UPON A LOST PROMISSORY NOTE or upon one voluntarily surrendered to its maker. *Reynolds v. French*, 456.

MALICIOUS PROSECUTION.

1. ACTION ON THE CASE FOR A MALICIOUS PROSECUTION BEFORE A COURT HAVING NO JURISDICTION, will lie, if the proceedings were malicious, unfounded, and without probable cause, and occasioned legal damage to the accused. *Stone v. Stevens*, 611.
2. ADMISSION OF A COPY OF THE RECORD, showing the arrest, trial, and acquittal of the defendant in a proceeding under a search warrant, in a subsequent action brought by him for a malicious prosecution, is not a ground for a new trial, where the same facts appear to have been proved by other evidence not objected to by the adverse party. *Id.*
3. JURY, IN AN ACTION FOR MALICIOUS PROSECUTION, are to judge as to the honesty, sincerity, and want of malice of the defendant in conducting such prosecution, and it is not error for the court to refuse to instruct the jury that if they believe from the evidence that the court in which the prosecution was instituted would not allow the prosecutor to testify, and denied an adjournment applied for on reasonable grounds, such facts afford sufficient evidence that the prosecutor had probable cause, and acted honestly, sincerely, and without malice. *Id.*
4. PLAINTIFF MUST SHOW WANT OF PROBABLE CAUSE and malicious motives on the part of the defendant, in an action for malicious prosecution, notwithstanding his trial and acquittal upon such prosecution. *Id.*
5. ERROR OF THE JUSTICE BEFORE WHOM A PROSECUTION was had, in rejecting evidence, etc., can not be inquired into collaterally, in an action for malicious prosecution. *Id.*
6. REASONABLE SUSPICION THAT ARTICLES WERE "TAKEN" by an accused person, does not necessarily afford probable cause for a prosecution for theft. *Id.*
7. MERE CONJECTURE OR SUSPICION is not probable cause for a prosecution for theft, but the facts must be such as would induce an impartial and reasonable mind to believe in the guilt of the accused. *Id.*

8. **MALICE MUST BE PROVED**, in an action for malicious prosecution, and though it may be presumed from a want of probable cause, this presumption may be rebutted by showing that the prosecution was without malice, and for justifiable ends. *Id.*

MARRIAGE CONTRACT.

See HUSBAND AND WIFE, 8.

MARRIAGE SETTLEMENTS.

1. **MARRIAGE SETTLEMENTS, WITHIN THE MEANING OF THE REGISTRY ACTS**, are such only as are founded on the consideration of marriage, and entered into before the marriage, or afterwards in pursuance of previous articles, or as are voluntary conveyances by the husband to the use of the wife, after the marriage. *Banks v. Brown*, 330.
2. **DEED OF SETTLEMENT BY A HUSBAND AFTER MARRIAGE**, executed in consideration of the wife's renunciation of her inheritance in her real estate, need not be recorded as a marriage settlement; and such deed is valid as against his creditors. *Id.*
3. **HUSBAND WILL NOT BE ALLOWED TO DEFEAUD HIS CREDITORS** by making an unreasonable settlement upon his wife, but such settlement, if reasonable, will be supported. *Id.*

MARRIED WOMEN.

1. **FEME-COVERT HAS NO POWER OF DISPOSITION** over her separate estate in Pennsylvania, except such as is given or reserved by the conveyance granting such estate. *Thomas v. Folwell*, 230.
2. **POWER TO DEVISE THE ESTATE IS NOT GIVEN** to a *feme-covert*, in such a case, by a conveyance to a third person, in trust, to receive the rents and profits and pay the same to her, or to such persons and in such manner as she shall, from time to time, appoint. *Id.*

MERGER.

MERGER IS NOT FAVORED IN EQUITY, and where a term for years and the fee meet in the same person, the former will not be merged in the latter if the continuance of the term is necessary to the protection of the owner of the inheritance, though the term would be merged at law. *Dougherty v. Jack*, 335.

See JUDGMENTS, 6.

MISNOMER.

1. **MISNOMER** of either the Christian or surname is good cause for a plea in abatement. *Lynes v. State*, 557.
2. **WHERE AN INDICTMENT CHARGED A PERSON BY THE NAME** of George Lyons, and his true name was George Lynes, a plea in abatement was held good. *Id.*

MONEY HAD AND RECEIVED.

See ACTIONS, 2.

MORTGAGES.

1. **WHETHER AN INSTRUMENT IS A MORTGAGE OR CONDITIONAL SALE** de-

- pends upon the intention of the parties, to be gathered from the deed and the evidence. *Hickman v. Cantrell*, 396.
2. TO MAKE A DEED A MORTGAGE ON ITS FACE, it must either show that the consideration was money loaned or a debt due, or it must express a covenant for the repayment thereof. *Id.*
 3. WHERE SEVERAL MORTGAGES OF THE SAME LAND are executed on the same day, one immediately following the other, to secure several debts due the several mortgagees, and are all proved and delivered to the clerk for recordation on the same day, but in the order in which they were executed, and there is no express agreement that any one should have priority over the other, or that they should all stand on the same footing, the one first executed is entitled to priority over the others. *Naylor v. Throckmorton*, 492.
 4. A MORTGAGEE IN POSSESSION AFTER CONDITION BROKEN is considered as having the legal estate, and may defend in ejectment. *Phyfe v. Riley*, 55.
 5. MORTGAGED PROPERTY, GIVEN IN SATISFACTION of a judgment, is taken subject to the mortgage. *Fennessy v. Gonsoulin*, 720.
 6. MORTGAGEE OF PERSONAL PROPERTY is entitled to its immediate possession. *Case v. Winship*, 664.
 7. PAROL EVIDENCE IS INADMISSIBLE to prove an understanding between the parties to a mortgage of personal property, that its possession should remain with the mortgagor. *Id.*
 8. MORTGAGEE OF PERSONAL PROPERTY MAY PURCHASE AT HIS OWN SALE; but he holds such a trust character as to throw upon him the burden of proving the fairness of such purchase. *Black v. Hair*, 389.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 11, 12, 13, 14.

MURDER.

See EVIDENCE, 18.

NEGOTIABLE INSTRUMENTS.

1. ORDER IS NOT NEGOTIABLE WHICH IS DRAWN ON THE POSTMASTER-GENERAL of the United States by a contractor, payable to order, to be charged to the drawer's account for transporting the mails, and the holder can not sue the drawer thereon in his own name. *Reeside v. Knox*, 247.
2. A NOTE DRAWN ON SATURDAY, payable one day after date, becomes due on the Monday following, if no days of grace are allowed. Action can not be commenced on the day of the date of the note, on the ground that the day following is Sunday. *Sanders v. Ochiltree*, 551.
3. WHERE, HOWEVER, A NOTE FALLS DUE ON A SUNDAY subsequent to the next day after its date, the day of payment is the day previous to that agreed upon by the parties for performance. *Id.*
4. SIGNING AND DELIVERING NOTE WITH BANK TO BE AFTERWARDS FILLED BY AMOUNT, gives unlimited authority to insert any sum; and in an action on such a note, a plea that the blank was, without the authority of the maker, filled with a larger amount than was intended, is not sufficient. *Hall v. Bank of Commonwealth*, 685.

5. PLEA THAT AMOUNT AND DATE ON MARGIN OF NOTE at time of its delivery, and intended to be inserted in the body thereof when filled up, were afterwards torn off without authority, and a different amount inserted, is good. *Id.*
 6. REPLICATION, TO PLEA OF NON EST FACTUM, that the note sued on was the act and deed of the maker, is insufficient. *Id.*
 7. DEMAND UPON THE DRAWEE WILL NOT BE PRESUMED in the absence of evidence thereof. *Tickner v. Roberts*, 706.
 8. DRAWER'S PROMISE TO PAY A DRAFT, made in ignorance that no demand has been made, is not binding. *Id.*
 9. ONUS OF PROVING DEMAND lies upon the payee; the drawer is not obliged to prove no demand. *Id.*
 10. INDORSER OF AN ACCOMMODATION NOTE IS RELEASED BY GIVING TIME to the maker by a binding agreement of the promisee without the indorser's knowledge. *Okie v. Spencer*, 251.
 11. HOLDER'S ACCEPTANCE OF A CHECK OF THE MAKER AND A THIRD PERSON made payable six days after the note is due, by means of being post-dated, with the understanding that it is to be in full satisfaction if paid at maturity, discharges the accommodation indorser, if done without his knowledge. *Id.*
 12. PLEA SETTING FORTH THE FACTS SPECIALLY IN SUCH A CASE is sufficient on demurrer, since the court will infer, as a conclusion of law, from the facts, that there was an agreement, upon sufficient consideration, for an extension of time, and it need not be pleaded as an agreement to extend the time. *Id.*
 13. PROOF OF INDORSEMENT OF PROMISSORY NOTE IS NOT NECESSARY, in an action by a *bona fide* holder against the maker who draws such note payable to a real person, forges his indorsement, and puts it in circulation; such maker will be estopped from denying its genuineness. *Meacher v. Fort*, 364.
 14. LAST INDORSER OF A PROMISSORY NOTE, who leaves it with a bank for collection, is himself the depositor, and the bank is responsible to him for the performance of its duty to make the collection. *Thompson v. Bank of S. C.*, 354.
 15. BANK WHICH TAKES NOTE FOR COLLECTION is bound to demand payment of the maker, and to cause notice to be given to all the indorsers, and is liable for all loss occasioned by its neglect to do so. *Id.*
 16. WHETHER PARTY HAS USED DUE DILIGENCE to charge indorser of note is a question of fact for the jury; but what constitutes sufficient notice of dishonor is a question of law. *Id.*
 17. GUARANTOR OF THE SOLVENCY of the maker of a note is entitled to reasonable notice of his insolvency, and will be discharged if it be not given, though he had knowledge of the insolvency independent of the notice. *Corbit v. Bank of Smyrna*, 635.
- See ACCORD AND SATISFACTION; AGENCY, 3, 4; ATTACHMENT, 13; CONFLICT OF LAWS, 2; LOST NOTES; PLEADING AND PRACTICE, 5.

NEW TRIAL.

1. MISDIRECTION, IN ACCORDANCE WITH THE REQUEST OF A PARTY, is not a ground for a new trial, applied for by such party. *Stone v. Stevens*, 611.

2. **MOTION TO SET ASIDE VERDICT, LIMITATION OF TIME FOR FILING.**--A motion to set aside a verdict, because of the improper conduct of jurors, must, by a uniform and long-established practice in Connecticut, be filed within twenty-four hours after receiving the verdict. *Id.*

NOTARY PUBLIC.

See AGENCY, 5.

NOTICE.

1. **THE RECORD OF A DEED WILL NOT IMPORT NOTICE** to subsequent purchasers or creditors, where it has been made by the officer intrusted with the duty of recording deeds, on the back leaf of a book which had been filled by the records of prior deeds, for twelve years past, and had since that time ceased to be used for recording purposes, and where, moreover, the names of the parties to the deed were not entered in the index to the records. *Sawyer v. Adams*, 459.
2. **RECORD OF A DEED IMPORTS NO NOTICE**, if in it appear defects, which had they been contained in the original, would have made it void. *Id.*
3. **RECORD OF A DEED** from which it appears that less was conveyed than was really conveyed, imports notice of a conveyance only to that extent. *Id.*

NUISANCE.

1. **ANY OBSTRUCTION IN A STREET** or highway which tends to annoy persons living upon or near it, or which renders it more difficult of passage, and increases the danger of injury to person or property from collision of carriages or other causes, is a nuisance. *State v. Mayor etc. of Mobile*, 564.
2. **AT COMMON LAW, WHERE THE PARTICULAR CHARGE** is the obstruction of a highway, the question of nuisance or no nuisance depends upon the fact whether its passage is rendered less commodious. *Id.*
3. **ERECTING A MARKET-HOUSE** in the center of a street or highway of a city, by a city corporation, which interferes with a commodious passage through such street, is a nuisance. *Id.*
4. **EQUITY HAS JURISDICTION**, in case of a nuisance, to restrain the exercise or the erection of, and in some cases to abate, that from which irreparable damage to individuals or great public injury will ensue. *Id.*
5. **JURISDICTION OF COURTS OF EQUITY** in affording preventive relief, in cases of public nuisances, is undoubted where the fact of nuisance is placed beyond question; but if it be questionable, the relief is usually withheld. *Id.*
6. **WHERE THE FACT OF NUISANCE IS QUESTIONABLE**, equity sometimes affords relief, by way of injunction, until a trial at law, if its denial would produce great public inconvenience. *Id.*
7. **PRINCIPLES UPON WHICH EQUITY ENTERTAINS AN INFORMATION** to restrain the exercise of a public nuisance or to abate it, are: 1. To prevent irreparable injury before a court of law could act definitively. 2. To prevent a protracted and expensive litigation where there are many persons to defend. *Id.*

OFFICIAL BONDS.

See BONDS, 4, 5.

OVERSEERS OF THE POOR.

See CORPORATIONS, 1, 2.

PARENT AND CHILD.

1. FATHER IS NOT BOUND BY THE CONTRACT OF HIS SON even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one. *Owen v. White*, 572.
2. WHERE THE CHILD CONTINUES UNDER THE DIRECTION and control of the father, it is left to the parent's discretion to determine what is necessary for him, unless it appears that there is a clear omission of parental duty in providing for the child's maintenance. *Id.*
3. WHERE THERE HAS BEEN SUCH OMISSION, the law compels the father to pay for necessaries furnished by a third person, upon the ground that a neglect of duty in this behalf implies an authority to bind the parent. *Id.*
4. WHERE A FATHER ABANDONS HIS INFANT CHILD, and forces him to leave his house, he is liable for a suitable maintenance; but where he voluntarily leaves his father's house, the authority of the father to purchase necessaries is not implied. *Id.*
5. JURY ARE TO DETERMINE whether the authority of a parent can be inferred from the facts. *Id.*
6. WHERE NO EVIDENCE IS GIVEN from which an authority can be inferred, the court may instruct the jury that the case is not made out. *Id.*
7. THE FATHER, AS GUARDIAN BY NATURE, has no right to the possession or use of his child's property. *Fonda v. Van Horne*, 77.
8. THE FATHER IS GUARDIAN IN SOCAGE, under the revised statutes, of lands vesting in an infant child. *Id.*
9. THE FATHER, THE GUARDIAN BY NATURE of his infant child, has only the care of his person and is not permitted to have any control over his property, real or personal. *Miles v. Kaigler*, 425.

PARTIES.

See PLEADING AND PRACTICE.

PARTITION.

See CO-TENANCY AND PARTITION.

PARTNERSHIP.

1. TO CONSTITUTE A PARTNERSHIP there must be some joint adventure and an agreement to share in the profit of the undertaking. *Loomis v. Marshall*, 596.
2. SHARING IN THE PROFITS IS THE TEST of a partnership, but the party must share in such profits as a principal; for a stipulation to receive a sum of money in proportion to a *quantum* of the profits as a reward for one's services will not make him a partner. *Id.*
3. AGREEMENT TO FURNISH A FULL SUPPLY OF WOOL to a manufacturer for a specified period, to be manufactured into cloth, in a workmanlike manner, providing that the manufacturer is to devote his factory exclusively to that work for the prescribed period; and that the net proceeds of the goods, after deducting incidental expenses and charges of sale, are to be

divided between the parties in a certain proportion, each of the parties to pay a certain proportion of the cost of the warp of certain kinds of cloth, and to bear the expense of insurance in proportion to their interest in the division of the profits, and also to share in any insurance paid upon a loss according to the loss which each should sustain, does not constitute such parties partners so as to be liable as such to a laborer suing for compensation for services in the factory. *Id.*

4. AN AGREEMENT BY A CONTRACTOR for carrying the mail with a sub-contractor, that he shall perform one half the service, and be entitled to one half the compensation, does not constitute a partnership between such parties. *Per Brooke, J. Wilkinson v. Jett, 493.*
5. PARTNER MAY TRANSFER THE WHOLE STOCK IN TRADE of the partnership *bona fide* in payment of debts of the firm, especially where his copartner has absconded, and the fact that the assignment is under seal is immaterial. *Deckard v. Case, 287.*
6. EMPLOYMENT OF THE PARTNER who made the transfer, and the resumption of business at the shop formerly occupied by the firm, if not a part of the consideration of the transfer and not *mala fide*, will not render such transfer fraudulent as against other creditors of the firm. *Id.*
7. PARTNER PRESENT AND ASSENTING TO THE EXECUTION OF A SEALED INSTRUMENT by his copartner in the firm name is bound thereby. *Fitchthorn v. Boyer, 300.*
8. SUCH PRESENCE AND ASSENT MAY BE PROVED by any evidence satisfactory to the jury, such as the admissions of the party. *Id.*
9. SEPARATE JUDGMENT CREDITOR OF A PARTNER IS NOT ENTITLED TO BE SUBSTITUTED to the rights of a judgment creditor of the partnership who has obtained satisfaction out of such partner's estate, to enable such separate creditor to proceed against the other partner, where there is nothing to show the latter partner indebted to his copartner whose property was taken to pay the firm debt. *Sterling v. Brightbill, 304.*

PATENTS—LAND.

1. IN SALES OF LAND BY THE UNITED STATES, the law gives the right, and the patent is considered, not the title itself, but the evidence by which it is shown that the prerequisites to a legal sale have been complied with. *Goodlet v. Smithson, 561.*
2. PURCHASER OF LAND FROM THE UNITED STATES, by the act of entry and payment of the purchase money, acquires an inchoate legal title, which may be alienated or divested in the same manner as any other legal title. *Id.*
3. PRIOR TO THE ISSUANCE OF A PATENT, the interest of one in lands purchased of the United States, and for which he has received a certificate of final payment, may be levied upon and sold under execution. *Id.*
4. CONFIRMATION OF A TITLE BY ACT OF CONGRESS is equivalent to a patent, and can only be defeated by a prior title out of the government. *Boatner v. Walker, 723.*
5. SETTLER'S POSSESSION UNDER DONATION ACT and confirmation of his title is superior to the certificate of the commissioners for the adjustment of land titles, followed by an order of survey and actual survey and location approved by the surveyor-general. *Id.*

6. **CONFIRMATION BY ACT OF CONGRESS OF TITLE** to specific tract of land is equivalent to a patent; but where the boundaries are vague and uncertain, the government may make a valid sale of land not necessarily embraced within the confirmation. *Slack v. Orillion*, 724.
7. **CONFIRMATION OF CLAIM** emanating from the former governments of Louisiana is but a relinquishment of title on the part of the government, and parties must look to the primitive title to ascertain the boundaries. *Id.*

PAYMENT.

1. **NOTES OF AN INSOLVENT BANK**, or of an insolvent individual, received as consideration of a contemporaneous contract, will operate as payment or satisfaction; but if received on a precedent debt, they will not be a discharge, in the absence of a special agreement. *Corbit v. Bank of Smyrna*, 635.
2. **NOTES OF AN INSOLVENT BANK RECEIVED ON GENERAL DEPOSIT** by another bank, after the first had suspended, both it and the depositor being at the time in ignorance of the fact of suspension, will render it liable to the depositor for the face value of the notes received. *Id.*

PLEADING AND PRACTICE.

1. **MISJOINDER OF PARTIES.**—Courts of law will not take cognizance of distinct and separate claims or liabilities of several persons in one action, though standing in the same relative situations. Hence, where two persons have covenanted with another, by distinct and separate writings, the one for the performance of several duties, and the other becoming surety for him, they can not be joined in the same action to recover for a breach. *Childress v. McCullough*, 549.
2. **DERIVATION OF AN EQUITABLE PLAINTIFF'S TITLE FROM THE LEGAL PLAINTIFF** need not be set out in the declaration, where a recovery on the naked legal title would be a conclusive bar to a subsequent action by any one, but it will be sufficient to mark the suit to the use of the equitable plaintiff; as in the case of an action brought in the name of an assignor to the use of his assignee. *Armstrong v. City of Lancaster*, 273.
3. **REJECTION OF EVIDENCE OF AN ASSIGNMENT** by the legal to the equitable plaintiff in such a case, though such evidence is in itself irrelevant, is a ground for reversal where it appears that the want of such evidence was regarded on all hands as an insuperable barrier to a recovery. *Id.*
4. **WANT OF ALLEGING SPECIAL DEMAND** in a declaration, is a defect that is cured after verdict. *Bliss v. Arnold*, 467.
5. **IN SUING UPON A NOTE OR BILL PAYABLE AT A SPECIFIED PLACE**, it is not necessary to either aver or prove a demand at the time and place specified. *Butterfield v. Kinzie*, 657.
6. **FACTS SHOULD BE PLEADED**, not the evidence to sustain them. *Church v. Gilman*, 82.
7. **TO A REPLICATION** on an action for the breach of the covenant of seisin, denying the defendant's plea that the deed under which he claims was executed before the enrolling and delivery of plaintiff's deed, a rejoinder is insufficient that it was executed before the commencement of the suit with a *videlicet* setting out a date prior to the execution of the plaintiff's deed. *Id.*

8. **MATTER IN AGGRAVATION** need not be noticed in a plea. *Rasor v. Qualls*, 658.
 9. **CONSTABLE SUED FOR AN ACT DONE BY VIRTUE OF HIS OFFICE** may, under the general issue, give evidence of any matter which is a defense to the suit. *Parker v Walrod*, 124.
 10. **A CASE ON EXCEPTIONS MUST BE REVERSED FOR ANY ERROR** appearing on the record, however trivial may be the right affected. *Irish v. Cloyes*, 446.
 11. **ADMISSION OF INCOMPETENT EVIDENCE**, by consent, for the defendant, does not justify the admission of other incompetent evidence for the plaintiff to which the defendant objects. *Wilkinson v. Jett*, 493.
 12. **WHERE, IN ASSUMPSIT** by J., a sub-contractor, against W., a contractor for carrying the United States mail, to recover J.'s proportion of the compensation received for the services rendered, a letter of the post-master-general is read in evidence by the defendant, without objection, to prove defaults committed by the plaintiff in the execution of that part of the contract which was underlet to him, a certificate of the post-master-general, showing the times and places of the defaults in the contract, is inadmissible on plaintiff's behalf against defendant's objection. *Id.*
- See CONTINUANCE; NEGOTIABLE INSTRUMENTS**, 5, 6, 12; **NEW TRIAL; WRIT OF ERROR.**

POSSESSION.

See ADVERSE POSSESSION; FRAUDULENT CONVEYANCES AND TRANSFERS, 2, 3, 4, 5.

PRE-EMPTION.

A PRE-EMPTOR PLANTING A CROP which matures after his pre-emption right expires, because of his failure to purchase during the time allowed him by law, may be dispossessed of it by one who, after the expiration of the right, purchases from the government. *Rasor v. Qualls*, 658.

PREFERENCES TO CREDITORS.

See ASSIGNMENTS, 3.

PRESUMPTION OF PAYMENT.

WHERE SIXTEEN YEARS HAVE BEEN ALLOWED TO PASS since the execution of a bond due on demand, the jury may presume its payment. *Atkinson v. Dance*, 422.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROCESS.

1. PROCESS REGULAR UPON ITS FACE, justifies all acts of an officer done in its execution. *Pierson v. Gale*, 487.

2. OFFICER IS PROTECTED IN EXECUTING PROCESS regular on its face and apparently within the jurisdiction of the court issuing it, such court having jurisdiction of the subject-matter and of such process. *Parker v. Walrod*, 124.
3. CASE IS THE PROPER REMEDY FOR ACTS DONE IN ABUSE OF PROCESS regular upon its face. *Pierson v. Gale*, 487.

See ATTACHMENT; EXECUTIONS; RETURN; SHERIFFS.

PROCHEIN AMI.

1. GUARDIAN AD LITEM AND PROCHEIN AMI are different, in that though an infant may prosecute by the latter, he must always defend by the former. *Miles v. Kaigler*, 425.
2. A PROCHEIN AMI CAN NOT RECEIVE THE MONEY ON A JUDGMENT in favor of his infant, enter satisfaction, and take the money out of court; much less can he compound the judgment. *Id.*
3. IDEM.—The *prochein ami's* power ceases when the judgment debtor files his bill in chancery to enjoin further proceedings on the judgment. *Id.*
4. WHERE, ON THE PROCHEIN AMI'S DEATH, the infants inherit from him property greater in amount than the judgment which he compounded, yet chancery will not prevent their looking to the judgment debtor, especially where the composition is of doubtful nature, and make the debtor resort to the *prochein ami's* estate. *Id.*

See HUSBAND AND WIFE, 5.

PROHIBITION.

1. WRIT OF PROHIBITION IS AN EXISTING LEGAL REMEDY, in a proper case, in Kentucky. *Arnold v. Shields*, 669.
2. WRIT OF PROHIBITION DOES NOT LIE to prevent a court from deciding erroneously, or from enforcing a wrong judgment, in a case in which it has a right to adjudicate, but only to prevent the usurpation of judicial power by a court that has no authority to decide the case which it is assuming to determine. *Id.*
3. PLEA TO THE JURISDICTION IS NECESSARY to the granting of a prohibition only in cases where a court may acquire jurisdiction by consent, waiver of objection, or by default, and not in cases where the court can not possibly acquire jurisdiction. *Id.*

See JUDGMENTS, 5.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLIC GRANTS.

See PATENTS—LAND.

QUALIFIED FEE.

See VENDOR AND VENDEE, 1.

QUANTUM MERUIT.

1. RECOVERY FOR WORK DONE UNDER SPECIAL CONTRACT.—A party tacitly adhering to the terms of a special contract for the performance of labor,

where, owing to misfortune or other cause, without the fault of either party, the work is not finished within the stipulated time, may recover under the common counts in assumpsit for the work, but is restricted to the rate of compensation stipulated in the contract. *Merrill v. Ithaca etc. R. R. Co.*, 130.

2. **PARTY PREVENTED FROM COMPLETING SUCH CONTRACT** in the time stipulated, by the fault of the other party, but going on with the work after the time until compelled to abandon it, may recover the value of the work done on a *quantum meruit*, and is not governed by the stipulations of the contract. *Id.*

QUO WARRANTO.

1. **INFORMATION IN THE NATURE OF QUO WARRANTO** to oust the defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against the individuals; but if the object is to effect a dissolution of a corporation, or to oust such corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation. *People v. Rensselaer etc. R. R. Co.*, 33.
2. **JUDGMENT OF OUSTER** is rendered against individuals for unlawful assuming to be a corporation, or against a corporation usurping a franchise. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges. *Id.*
3. **AN INFORMATION FILED AGAINST A CORPORATION** in its corporate name, admits the existence of the corporation. *Id.*

RECOGNIZANCE.

See WITNESSES.

RECORD OF DEED.

See NOTICE.

RELIGIOUS SOCIETIES.

1. **RELIGIOUS ASSOCIATION FORMED ON THE BASIS** of a community of property, each member surrendering to the association the property that he owns, to be enjoyed in common by all, and agreeing to promote its interest by his labor and otherwise, in consideration that he is to receive religious instruction, etc., as well as support for himself and family, and that in case of his withdrawal from the association, the value of his property is to be refunded to him, is not forbidden by law. *Schriber v. Rapp*, 327.
2. **PRIVILEGE OF WITHDRAWAL SECURED** to the members of such an association, can not be exercised after the death of a member by his personal representative so as to enable him to claim compensation for services rendered to the society by the decedent. *Id.*

RENT.

See DISTRESS FOR RENT.

RES ADJUDICATA.

See JUDGMENTS.

RESCISSION OF CONTRACTS.

See INFANCY, 4.

RETROSPECTIVE STATUTES.

See STATUTES, 5.

RETURN.

1. OMISSION OF THE SHERIFF TO SIGN THE RETURN OF A WRIT, renders such return irregular. *Devoar v. Spence*, 241.
2. MISRETURN OR AN IRREGULAR RETURN IS AMENDABLE, but it is otherwise where there is no return, which renders the subsequent proceedings void. *Id.*
3. UNSIGNED INDORSEMENT ON A SUMMONS IN PARTITION of "*nihil habet*, and published as the law directs," when returned into the prothonotary's office, which is referred to in a subsequent part of the record as the sheriff's return, is an insufficient return, and is amendable, and a judgment by default founded thereon is not void. *Id.*
4. OFFICER'S RETURN IS ONLY PRIMA FACIE EVIDENCE of a fact. *Hutchins v. Johnson*, 622.

See GUARDIAN AND WARD, 4, 5.

REVOCATORY ACTION.

See ACTIONS, 3, 4.

SALES.

1. PAYMENT OF EARNEST MONEY does not necessarily transfer title to the specific property for which it has been given. *Jennings v. Flanagan*, 683.
2. TROVER OR DETINUE CAN NOT BE MAINTAINED BY A PURCHASER against his vendor, until he has paid or tendered the entire consideration for the property bought. *Id.*
3. COMPLETE AND PRESENT RIGHT OF PROPERTY DOES NOT VEST IN THE BUYER, while anything remains to be done on the part of the seller, before the commodity purchased is delivered. *Id.*
4. DEFENDANT, IN AN ACTION FOR THE AGREED PRICE OF GOODS, is entitled to an allowance in the assessment of damages of the difference between the contract price and the value, where the property proves inferior in quality to that which the vendor expressly agreed to furnish; but he is not entitled to a further allowance of the amount which he has lost by losing the sale of the property at a profitable advance. *McAlpin v. Lee*, 609.

See COMMISSION MERCHANTS, 3; FRAUDULENT CONVEYANCES AND TRANSFERS, 2, 3, 4, 5.

SAVINGS BANKS.

See CORPORATIONS, 15, 16.

SCHOOLS.

VOLUNTARY NEIGHBORHOOD SCHOOL is not within the statute relating to the districting of townships in Pennsylvania. *Martin v. McCord*, 342.

SEALS.

See DEEDS, 5.

SET-OFF.

See IMPROVEMENTS.

"SHELLEY'S CASE."

1. THE RULE IN SHELLEY'S CASE was brought over by our ancestors, formed part of the colonial laws, and until abrogated by statutory enactment, must continue to be law in Tennessee. *Polk v. Faria*, 400.
2. THE RULE IS ONE OF PROPERTY AND PUBLIC POLICY, and not of intention or construction. The same is true also in cases of wills, which give rise to the application of the rule. *Id.*
3. REASON AND POLICY OF THE RULE considered. *Reese, J. Id.*

SHERIFFS.

THE SHERIFF OF A NEIGHBORING STATE has not the right to pursue and recapture in Vermont a prisoner held on civil process, who has in such neighboring state escaped from his custody. *Bromley v. Hutchins*, 465.

See ATTACHMENT, 5, 6, 7, 8; ESCAPE, 1; EXECUTIONS, 4, 7.

SHIPPING.

1. THE HIRE OR RENT OF A VESSEL IS DUE, when it depends alone on the will of the hirer or lessee to enjoy the thing, or when he has not been prevented from enjoying it by the lessor. *Tio v. Vance*, 715.
2. IF CARGO IS DELIVERED AT PLACE OF DESTINATION, the whole freight will be earned, no matter how deteriorated in value by the perils of the sea. *Id.*
3. IT IS NOT NECESSARY TO TRANSPORT THE CARGO in the same vessel; in case of necessity arising from *vis major* during the voyage, the captain or owners have a right to repair, if it can be done within a reasonable time, or to employ another vessel and earn the freight. *Id.*
4. OWNERS ARE ENTITLED TO FULL FREIGHT, where, on an accident happening to the vessel the first day out necessitating repairs, she was repaired within ten days, and was ready to proceed, but the charterers refused to go on with the voyage. *Id.*

SPECIFIC PERFORMANCE.

1. WHERE EITHER PARTY HAS PERFORMED a valuable part of his contract for the sale and purchase of an estate, and is in no default for not performing the residue, he is entitled to a specific performance of the other part. *Hays v. Hall*, 530.
2. SPECIFIC PERFORMANCE OF A CONTRACT will be decreed in equity whenever it is impossible to place a party in *status quo* who has performed a valuable part of his agreement, and is in no default for not performing the residue. *Id.*
3. WHERE THE SPECIFIC EXECUTION OF AN AGREEMENT respecting lands will be decreed between the parties, it will be decreed between all parties claiming under them in privity of estate, or representation, or title, unless other controlling equities intervene. *Id.*

4. WHERE A. MADE AN AGREEMENT for the sale of lands with B. and C., and took the notes of the latter, with D. and E. as sureties; and A. gave his bond, conditioned to make titles to the lands, when the notes were paid; and immediately afterwards B. and C. assigned the bond to D. and E. to indemnify them for becoming sureties; and subsequently A. dying, and D. and E. being in possession of the land, and D. exercising a control over them, paid the last note due, after suit, and took from A.'s representatives and heirs a bond conditioned for the executing of a title to D., within a specified time, and on the expiration of this time brought his action upon the bond, it was held, on a bill filed by A.'s representatives and heirs for a specific performance: 1. That A.'s administrator was entitled to a specific execution of the contract of his intestate, and that A.'s heirs were proper parties as complainants. 2. That the bond executed by the representatives and heirs was without consideration and void. 3. That it was proper for the complainants to make the matter of their bond a part of the case, and that equity might decree a cancellation thereof. 4. That the delay in filing the bill did not prevent the court from decreeing a specific execution of the agreement, because the parties holding the bond of A. could have applied to the orphans' court to have perfected their title. 5. That an equitable mortgage on the land was created by the assignment of the bond of the intestate A. by the vendees to their sureties, in favor of the latter, which might be foreclosed. 6. That all the heirs of the vendor, and of the assignee of the vendees, should be made parties before the relief sought could be decreed, and that for that purpose the decree should be reversed and proper amendments allowed in the lower court. *Id.*
5. PAROL AGREEMENT FOR THE SALE OF REAL ESTATE, no part of which has been performed, can not be enforced by either party, nor by their representatives after they are dead. *White v. Beard*, 502.

See EQUITY, 4, 5.

STATUTES.

1. CONSTRUING A STATUTE ACCORDING TO ITS EQUITY, is to give effect to it according to the intention of the law-makers as indicated by its terms and purposes. *Blakeney v. Blakeney*, 574.
2. A STATUTE MAY BE EXTENDED or restrained by an equitable construction, and a case out of the mischief intended to be remedied by a statute may be construed to be out of the purview, though it be within the words of the statute. *Id.*
3. TITLE OF AN ACT MAY BE REFERRED TO for the purpose of ascertaining the intent of the legislature, when not clearly manifest in the body of the act. *Id.*
4. STATUTE OF 1826, Aik. Dig., 1st ed., 260, does not authorize the commencement of an action *de novo*, by the personal representative of a deceased, for an injury done in the life-time of the latter. *Id.*
5. RETROSPECTIVE OPERATION WILL NOT BE GIVEN A STATUTE without a clearly expressed intention of the legislature. *Garrett v. Dos ex dem. Wiggins*, 653.

See CONSTITUTIONAL LAW, 1, 3, 4; CORPORATIONS, 6, 7, 8; EMINENT DOMAIN, 3, 4; JEOPARDY.

STATUTE OF FRAUDS.

1. EXECUTED CONTRACT NOT WITHIN STATUTE OF FRAUDS.—Where one agrees by parol to give a lot of ground in consideration that certain of his neighbors will build a school-house thereon for the use of the neighborhood, and the house is built accordingly, they become purchasers of the land, and the title passes to them, notwithstanding the statute of frauds, as trustees for the purpose contemplated. *Martin v. McCord*, 342.
2. SUCH A TRUST IS NOT TOO VAGUE OR UNCERTAIN TO BE ENFORCED. *Id.*
3. PAROL GIFT OF LAND IS NOT SO FAR EXECUTED BY REASON OF IMPROVEMENTS as to take the case out of the statute of frauds, and prevent a rescission, where it appears that the donee has been in possession five years, but has made improvements not to exceed the value of one year's rent, and those not of permanent value. *Wack v. Sorber*, 269.
4. SIGNING A CONTRACT TO SELL LAND only by the party to be charged is sufficient to satisfy the statute of frauds. *McCrea v. Purmort*, 103.
5. PROMISE TO PAY DEBT OF ANOTHER, IN CONSIDERATION OF THE LATTER'S DISCHARGE THEREFROM, is an original undertaking, not required by the statute of frauds to be in writing; nor does such an undertaking require a consideration moving between the person promised for and the person who promises. *Corbett v. Cochran*, 348.
6. CONSIDERATION TO SUPPORT SUCH PROMISE NEED NOT BE A PRECUIARY ONE, nor even one beneficial to the promisor; if it be a loss or inconvenience to the promisee, it is sufficient. *Id.*

See AUCTION SALES; DEEDS, 10; LICKNER.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS APPLIES IN EQUITY *proprio vigore*, and must have the same effect as at law in cases of concurrent jurisdiction. *McCrea v. Purmort*, 103.
2. FRAUD OR MISTAKE PREVENTING AN ASSERTION OF THE CLAIM, within the statutory period, does not defeat the statutory bar. *Id.*
3. ADMISSION OF THE DEBT, EXPRESS OR IMPLIED, and made either to the party or to a stranger, avoids the bar of the statute in such a case. *Id.*
4. STATUTE OF LIMITATIONS, BAR OF, IN CASES OF TRUST.—In the case of a trust constituted by the act of the parties, the possession of the trustee is that of the *cestui que trust*, and no length of possession will bar; but the possession of a trustee, made such by the decree of a court of equity, is considered adverse, and, in that case, the statute of limitations will be a bar. *Edwards v. University*, 170.
5. PLAINTIFF, TO PROVE A DISABILITY WHICH EXEMPTS HIM FROM THE OPERATION of the statute of limitations, must show that it was a continuing disability from the time the cause of action first accrued. *Id.*
6. NEW PROMISE—WHAT SUFFICIENT TO REVIVE DEBT BARRED BY THE STATUTE OF LIMITATIONS.—A debtor by saying that he has an account against his creditor which he will discount against his claim, and that he will settle with him when such account is made out, makes a sufficient acknowledgment of, and promise to pay the debt, to take the case out of the statute of limitations. *Johnson's Adm'x v. Bounethea*, 347.

STREETS.

See CORPORATIONS, 12; NUISANCE, 1, 2, 3.

SUBROGATION.

See EXECUTORS AND ADMINISTRATORS, 10.

SUNDAY.

SUNDAYS ARE EXCLUDED IN THE COMPUTATION of the time within which a motion in arrest of judgment must be filed. *Stone v. Stevens*, 611.

See NEGOTIABLE INSTRUMENTS, 2, 3.

SURETYSHIP.

1. **SURETY WHO PAYS WHOLE AMOUNT** for which he and other sureties are bound to the same person for the performance of the same conditions, may compel contribution from such other sureties, although they are not bound by the same bond. *Bosley v. Taylor*, 677.
2. **ALL THE SOLVENT SURETIES MUST BEAR THE BURDEN EQUALLY**, where some of the sureties have become insolvent. *Id.*
3. **NON-RESIDENCY OF SURETY** is equivalent to his actual insolvency, so far as the application of the doctrine of contribution is concerned. *Id.*
4. **SURETY WHOSE LIABILITY IS COLLATERAL MERELY**, may justly submit to suit in order to ascertain the extent of his liability, and is entitled to contribution for the costs of such suit. *Id.*
5. **INTEREST IS ALLOWED TO SURETY WHO HAS PAID**, from the time of the payment up to the final decree. *Id.*
6. **SURETIES CAN NOT BE PREJUDICED** by an arrangement between the creditor and principal debtor, whereby time is given to the latter, unless they had knowledge thereof and acquiesced therein. *Everett v. United States*, 584.
7. **WHEN IT APPEARS THAT THE TIME OF PAYMENT** has been extended by a creditor at the instance of the principal debtor, and no evidence is offered to show that the sureties of the latter had any knowledge of such extension, an instruction that from the acts of the creditor the jury may infer a knowledge of such extension by the sureties, is erroneous. *Id.*
8. **UNDERTAKING OF A PRINCIPAL TO PAY HIS SURETY** the amount of the demand for which he stands liable, whenever he is called upon for payment by the creditor, or whenever he should have reason to doubt his principal's ability to ultimately save him harmless, is valid, and may be enforced upon either of these contingencies arising, though at the time the surety has paid the creditor no part of the debt. *Fletcher v. Edison*, 470.
9. **A SURETY IN WHOSE HANDS ARE FUNDS OF HIS PRINCIPAL**, created for his indemnity, is responsible to the latter for the same, if they are not needed to effectuate his discharge from liability. *Id.*
10. **SURETY WHO PAYS JUDGMENT OBTAINED AGAINST HIMSELF AND HIS PRINCIPAL** thereby satisfies it, and reduces himself to the situation of a simple contract creditor of such principal; but if he takes an assignment of such a judgment to a stranger, and does not intend to satisfy it, the judgment will not be extinguished by the payment. *Briley v. Sugg*, 172.

SURVEY.

See BOUNDARIES, 2.

TAXATION AND TAX TITLES.

1. LANDS GRANTED TO THE TRUSTEES of Davidson academy, in Tennessee, are exempt from taxation for ninety-nine years, under the language of the act, notwithstanding into whose hands they may come. *State v. Hicks*, 423.
2. VALIDITY OF A TAX DEED is governed by the law in effect at the time of the sale, though this has been altered before the execution of the deed, where in the statute working the change, no words are to be found extending its operations to prior sales. *Garrett v. Doe ex dem. Wiggins*, 653.
3. PREREQUISITES TO A VALID TAX SALE must be strictly proved in ejectment upon a tax deed, unless the necessity of the proof has been dispensed with by statute. *Id.*

TENANTS IN COMMON.

See CO-TENANCY AND PARTITION.

TESTAMENTARY GUARDIAN.

See GUARDIAN AND WARD.

TIME.

TIME IS CONSIDERED THE ESSENCE of an agreement when it is made so by the terms of the contract, and also where a party who seeks relief has been in default himself, without any just excuse or any acquiescence or subsequent waiver by the other party. *Hays v. Hall*, 530.

See NEGOTIABLE INSTRUMENTS, 2, 3; SUNDAY.

TRESPASS.

1. TRESPASS DOES NOT LIE FOR GOODS DELIVERED BY THE OWNER to the defendant, and afterwards sold by the latter to a stranger without authority. *Bradley v. Davis*, 729.
2. ABUSE OF A LICENSE GIVEN BY THE OWNER of goods does not constitute the licensee a trespasser *ab initio*. *Id.*
3. OWNER OF LAND IS NOT LIABLE IN TRESPASS for cutting and carrying away the grain or grass of one in wrongful possession. *Barnes v. Dean*, 346.
4. PLEA THAT ENTRY WAS BY LICENSE OF THE REAL OWNER is good to trespass for breaking a close and carrying off the grain. *Rasor v. Qualla*, 658.
5. THE GENERAL ISSUE IN TRESPASS will allow proof that the breaking the close complained of was by license of the real owner. *Id.*

TROVER.

1. TROVER WILL NOT LIE FOR A PORTION purchased of a larger quantity of like property, where, subsequently to the purchase, there has been no further act done to specify and identify the part sold. *Woods v. McGee*, 202.
2. ASSERTION OF OWNERSHIP OVER PROPERTY IN ONE'S POSSESSION is not evidence of conversion, where made to a stranger not within sight of the property, nor in the presence of the real owner. *Irish v. Cloyes*, 446.
3. DEMAND AND REFUSAL ARE EVIDENCE OF CONVERSION only where the property whereof they were predicated was in the possession of the party refusing. *Id.*
4. DEMAND AND REFUSAL ARE NOT IN THEMSELVES a conversion, but only evidence thereof. *Id.*

5. **CONVERSION EVIDENCED BY UNQUALIFIED REFUSAL** is not obviated by subsequent acts in recognition of the owner's rights; therefore, where several days after an unqualified refusal to surrender to plaintiff his property, in defendant's possession, said defendant pointed out the property to a tax collector as that of plaintiff, and the collector thereupon made distress upon and finally sold the property, and applied the proceeds in discharge of plaintiff's tax bill, this was held not to obviate the conversion evidenced by the refusal. *Id.*
6. **APPLICATION OF CONVERTED PROPERTY** in discharge of the original owner's liabilities, with respect to it, will go in mitigation of damages, in trover brought for the conversion. So if the property converted was pointed out to a tax collector as that of plaintiff, and was thereupon by the collector levied upon and sold, and the proceeds of the sale applied in discharge of plaintiff's tax bill, this may be shown in mitigation. *Id.*
7. **A RIGHT OF ACTION FOR A CONVERSION IS NOT WAIVED** by plaintiff's request to a tax collector who has seized the property as that of plaintiff, to postpone his sale. *Id.*

See SALES, 2.

TRUSTS AND TRUSTEES.

1. **A TRUSTEE CAN NOT PURCHASE** at his own sale, either directly or indirectly, and a sale made to himself of the trust estate, or to another for his benefit, will be set aside. *Saltmarsh v. Beene*, 525.
2. **AN AGREEMENT ENTERED INTO BY A COMMISSIONER** appointed by the orphans' court, to sell real estate, by which the property to be sold is to be purchased by another person, and afterwards divided between them, will not be enforced in equity. *Id.*

See STATUTE OF FRAUDS, 2; STATUTE OF LIMITATIONS, 4.

UNRECORDED DEED.

See ADVERSE POSSESSION, 5.

USAGE.

1. **CUSTOM OR USAGE OF TRADE MAY BE USED** as a means of ascertaining the intention of parties to a contract, but never to thwart or control such intention. *Kendall v. Russell*, 696.
2. **CUSTOM OR USAGE OF TRADE, TO BE OBLIGATORY, MUST BE CERTAIN, uniform, reasonable, and sufficiently ancient to be generally known.** *Id.*
3. **EVIDENCE OF PARTICULAR CUSTOM INADMISSIBLE, WHEN.**—A contract for as many brick as the buyer needs to complete his building, at a fixed rate per thousand, can not be varied by evidence of a custom of the country for the buyer to pay for brick enough to build all the walls solid, without making allowance for the openings for doors and windows. *Id.*
4. **EVIDENCE OF USAGE** or custom is admissible for the purpose of ascertaining the sense and understanding of parties by their contracts which are made with reference thereto. *Sampson v. Gazam*, 578.
5. **SUCH USAGE OR CUSTOM** becomes a part of the law of the contract, and rests on the same principles as the doctrine of the *lex loci*. *Id.*
6. **WHERE A CUSTOM OR USAGE IS PROVED** to exist in relation to a particular trade or pursuit, if it be general, all persons engaged therein are presumed to contract with reference to it. *Id.*
7. **WHERE WORDS FROM USAGE OR CUSTOM** are used in a sense by one class

of the community different from their general acceptation among others not engaged in the same pursuit, courts will construe them in the sense in which they are used by such class. *Id.*

6. EVIDENCE OF A USAGE OR CUSTOM is admissible to vary the common law liability of common carriers by water. *Id.*
9. PAROL EVIDENCE IS ADMISSIBLE to show that the words "dangers of the river," in a bill of lading, are, by the usage and custom of merchants and others, understood to include other dangers than those arising from the element of water. *Id.*
10. ANY PRACTICE OR USAGE, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom; because it lacks the essential ingredient of a good custom, it is not immemorial. *Harris v. Carson*, 510.
11. PAROL EVIDENCE IS INADMISSIBLE TO EXPLAIN A WRITTEN LEASE for a fixed and certain period by showing a usage that an outgoing tenant is entitled to the crop on the land at the determination of the lease. *Id.*

See COMMISSION MERCHANTS, 2.

VENDOR AND VENDEE.

1. QUALIFIED, BASE, OR DETERMINABLE FEE CAN NOT BE IMPLIED by law, but is created by the express terms of a deed, will, or other instrument of writing. *Union Canal Co v. Young*, 212.
2. LAND SOLD FOR A CANAL CEASING TO BE USED AS SUCH does not revert to the grantor, where the sale was absolute and unconditional. *Id.*
3. FEE PASSES BY A SALE TO A CANAL COMPANY OF LAND over which the canal is to pass, under an agreement which contains nothing to show that only a right of way was intended to be sold, where the company has a right to acquire land either in fee or for a less estate. *Id.*

VOID DEED.

See EQUITY, 3.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES AND TRANSFERS, 1.

WARRANTY.

See CO-TENANCY AND PARTITION, 6, 7; COVENANTS; INSURANCE, 14.

WATER-COURSES.

1. GRANT OR SURVEY BOUNDED ON A RIVER OR CREEK in Pennsylvania extends to the river or creek, and except in the case of large navigable streams, to the middle of the creek, and no other person can come between the grantee and the stream and cut him off from it. *Ball v. Slack*, 278.
2. COURSES AND DISTANCES ALONG A STREAM RETURNED as the line of a grant or survey, are to be disregarded so far as they do not agree with the line of the stream. *Id.*
3. MOUTH OF A CREEK emptying into a tide-water stream is the point at which it discharges its waters into the stream, and not the point at which its current is stopped by tide-water, and is the same at high as at low water. Hence a grant described as beginning at the mouth of such a

creek begins at low-water mark, on the stream into which it empties, and at low-water mark on such creek. *Id.*

4. **LAND BETWEEN HIGH AND LOW-WATER MARK.**—The right to land between low water and ordinary high water on a stream in which the tide ebbs and flows, is in the owner of the adjacent fast land as against an intruder, subject to the use of it by the public as a common highway. *Id.*
5. **POSSESSION OF THE FAST LAND** is possession of the flats in such a case, and is not interrupted by the passage of boats and other craft over the flats at high water. *Id.*
6. **RIGHT TO BUILD WHARF BELOW HIGH-WATER MARK.**—A third person has no right to erect a wharf on the land below high-water mark on a tide-water stream, or on a creek emptying into it, without the permission of the owner of the adjacent fast land. *Id.*
7. **SHIFTING OF MOUTH OF CREEK WHICH IS BEGINNING POINT.**—Where the mouth of a creek, which is the beginning point of a grant bounded on one side by such stream, shifts gradually, owing to the action of the creek and the stream into which it empties, the change operates to the gain or loss of the parties on the respective sides of the creek; but if it is occasioned by the act of one of the parties, the other party is not injured thereby. *Id.*
8. **THE ERECTION OF A BRIDGE ACROSS A NAVIGABLE RIVER**, at a point below where licensed vessels carry on a coasting trade, may be allowed, provided the bridge be built with a draw so as not to impair the usefulness of the river. *People v. Rensselaer etc. R. R. Co.*, 33.

WAYS.

See EASEMENTS.

WITNESSES.

- RECOGNIZANCE TO APPEAR AS WITNESS** at a certain term of court imposes upon the conusee the obligation to appear, if the case is not heard at that term, at each succeeding term until the case is determined. *State v. Keyes*, 450.

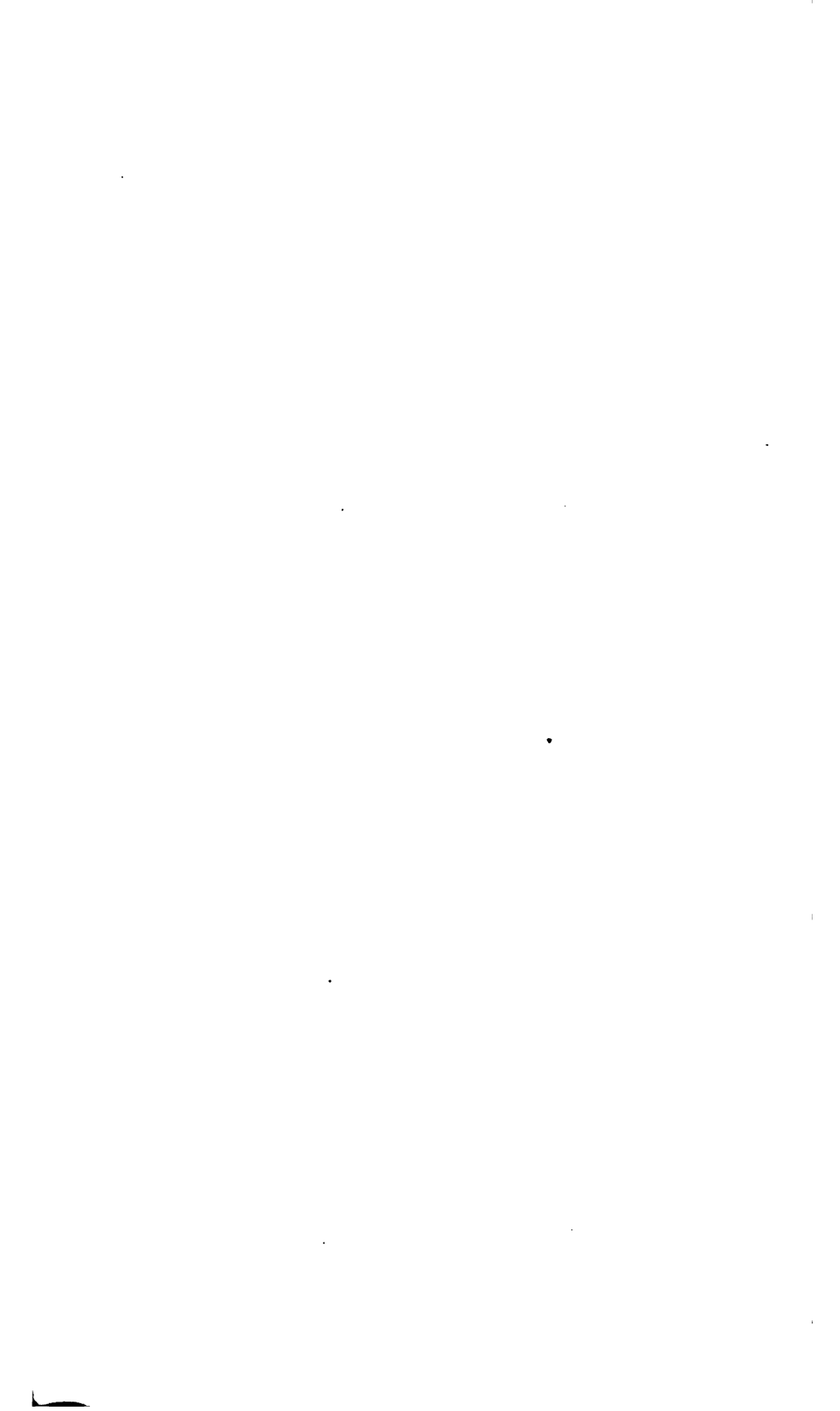
See CRIMINAL LAW, 2, 3; EVIDENCE.

WRIT OF ERROR.

1. **WRIT OF ERROR IS AN ORIGINAL WRIT** issuing out of the court of chancery, in the nature as well of a certiorari to remove a record from an inferior to a superior court as of a commission to the judges of such superior court to examine the record and to affirm or reverse it. *Lynes v. State*, 537.
2. **SUCH WRIT DOES NOT OWE ITS ORIGIN TO STATUTE**, but it is a common law writ, and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit in a court of record. *Id.*
3. **WHERE THE LEGISLATURE HAS OMITTED** to prescribe the manner in which the constitutional power of the supreme court is to be exercised over subordinate jurisdictions in criminal cases, resort to such writs as are known to the law will be had in bringing such cases before it for revision. *Id.*
4. **SUPREME COURT HAS THE POWER**, in the exercise of its criminal jurisdiction, to bring before it criminal cases by writ of error. *Id.*

WRIT OF PROHIBITION.

See PROHIBITION.



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